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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Merlita Pascua Summerfiled,
Petitioner,

V.

Immigration and Naturalization Service,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the phrases "**born ... in the United States**" and "**born within the territory of the United States**" have the same construction within the meaning of the **Citizenship Clause of the Fourteenth Amendment**.

2. Whether it was constitutionally permissible for Congress to **collectively denationalize** American nationals **at birth**, who were not aliens in the United States, **without due process of law**.

3. Whether it is constitutionally permissible - within the meaning of the anti-slavery provision of the Thirteenth Amendment - for Congress to create a **less-than-full-fledged citizen status or quasi-citizenship status** - i.e., U. S. nationality status - for **persons who are <u>not aliens</u>** in the United States.

4. Whether Section 14 of the Philippine Independence Act of March 24, 1934 - which **automatically dissolved or revoked the American nationality** or non-alien status of all Filipinos - is a **Bill of Attainder** within the meaning of the United States constitution.

5. Whether the designation of the petitioner as American national at birth and the subsequent **arbitrary automatic, statutory re-designation** of her status as "**alien**" without cause deprived her of her right to "**equal protection of the law.**"

6. Whether citizenship is a **fundamental right** which applies **on its own force** in any territory of the United States.

7. (a) Whether Section 14 of the Philippine Independence Act of March 24, 1934 is a "**needful rule**" within the meaning of Section 1, Article 1V of the Constitution, and (2) whether the Power of Congress to make all "**needful rules**" carries with it the **power to dissolve or revoke American nationality or non-alien status, <u>and</u> destroy all fundamental civil and political rights** following directly therefrom, **without due process of law**.

8. Whether the ***"right against the deprivation <u>property</u> without due process of law"*** is **as constitutionally important as** ***"the right to one's American <u>nationality</u>"***, and whether both can be taken away without due process of law.

Table of Contents

	Page
Questions Presented for Review	i
Table of Authorities	iii-iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	3
Constitutional Provisions Involved	4
Statement of the Case	4
A. Petitioner and her American Nationality	4-7
B. Petitioner and the United States	7-10
C. Proceedings before the Court	10-12
Reasons for Granting the Petition	12
1. The Decision of the Ninth Circuit Court of Appeals was Erroneous	13
A. Meaning of "Born in the United States"	13-15
B. Collective Denationalization	15-18
C. The Thirteenth Amendment	18-19
D. Bill of Attainder	19-20
E. The "Needful Rule" Clause	21
F. Equal Protection Clause	21-22
Long Pattern of Racial Discrimination	22-23
11. The Questions Presented are Important	23-24
Conclusion	24
Appendices:	
A - Opinion of the Ninth Circuit Court of Appeals of the United States:	
Prevailing Opinion	A1-A4
Dissenting Opinion	A-4
B - Opinion on Motion for Rehearing	B1
C - Opinion on Rabang V. INS	C1-C39
Prevailing Opinion	C1-C12
Dissenting Opinion	C12-C39
D - Order, and related documents, issued by Imm. and Naturalization District Director	D1-D6
E - Decision of the Board of Imm. Appeals on Motion to Reconsider	E1-E3
F - Decision of the Board of Imm. Appeals	F1-F9

Table of Authorities

Cases **Page**

Alfafara v. Fross, 26 C. 2d 358 9
Calvin's Case, 77 Eng. Rep. 377, 399 (Exch. Ch. 1608).....15
Downess v. Bidwell, 182 U.S. 244 (1901).....13
Englis v. Sailor's Snug Harbor, 3 Pet. 99, 155 (1830) 5
Gonzales v. Williams, 192, U.S. 1, 13.....9
Losier v. Sherman, 157, Kan. 153, 138 P. 2d 272, 273.....20
Rabang v. INS, F. 3d. 1449 (9th Cir. 1994).....1
Ridell v. Pennsylvania R. Co. , 262 Pa. 582, 106, A. 80,81.....6
Slaughter House Cases, 16 Wall. 36, (1873).....15
State of Graves, 352, Mo., 1102, 182 S.W. 2d 46,54.....20
Summerfield v. INS, 37 F. 3d 1506 (9th Cir. 1985).....1
Trop v. Dulles, 356 U.S. 86, 99-102 (1958).....11
United States v. Wong Kim Ark, 169 U.S. 694 (1898).....5, 13,15

Constitutional Provisions

Section 1, Article X111.....3
Section 1, Article XIV.....3
Section 3, Article 1V.....3

Statutes

28 U.S.C. 1254(1) 2
28 U.S.C. 1291.....2
Nationality Act of 1940, ch. 876, Sec. 202, 54 Stat. 1137.....15
Organic Act of Guam, ch. 512, Sec. 4(a), 64 Stat. 691.....15
Organic Act of Puerto Rico, ch. 145, Sec. 55, 39 Stat. 951, 953 (1917).....15
Philippine Government Act, ch. 1369,32 Stat. 691(1902).....2,15
Philippine Autonomy Act, ch. 416, 39 Stat. 545 (1916).....15
Philippine Independence Act, ch. 84, 48 Stat. 456(1934).....2,15
Treaty of Paris.....2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Merlita Pascua Summerfield, Petitioner,

v.

Immigration and Naturalization Service, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Merlita Pascua Summerfield respectfully petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, which directly deals with some of the issues raised in the instant case, was extensively made in ***Rabang v. INS*** **[F. 3d 1449 (9th Cir., 1994]**. ***Rabang v. INS*** and the instant case, ***Summerfield v. INS [37 F.3D 1506 (9th Cir. 1994)]***, was - upon the suggestion of the 3-man panel of the Ninth Circuit Court of Appeals - argued simultaneously or in tandem on August 8, 1992 because similar constitutional issues were involved in these two cases. *Rabang v. INS* was an appeal from a district court's decision in Hawaii; whereas *Summerfield v. INS* was a petition for the review of a decision by the Board of Immigration Appeals. The main difference between these two cases lies in the fact that in *Rabang*, petitioners claim that they are still citizens of the United States. While in *Summerfield*, the petitioner asserts that - in the event the Court finds her to be a non-citizen within the meaning of the Fourteenth Amendment - she is still an **American national and not an alien** in the United States.

On September 19, 1994, a decision was made on both cases but Judge Harry Pregerson's dissenting opinion was made an integral part of the majority ruling in *Rabang v. INS*. The opinion in Rabang is hereto attached [as App. C1-C39] and made part hereof.

JURISDICTION

The Court of Appeals entered its judgment on September 19, 1994 (App., infra, A1-A4). The jurisdiction of this Court is invoked under 28 U.S. C. Section 1254 (1). Whereas the jurisdiction of the Ninth Circuit Court was invoked under 28 U.S.C. Section 1291. The Ninth Circuit Court of Appeals denied a timely petition for rehearing on November 8, 1994 [App. B1].

STATUTORY PROVISION INVOLVED

Article IX of the **Treaty of Paris** provides, in relevant part, *"The **civil rights and political status** of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."* (Emphasis added.)

Section 14, **Philippine Independence Act , ch. 84, 48 Stat. 456 (1934)** : *"Upon the final and complete withdrawal of American sovereignty over the Philippine Islands, the immigration laws of the United States (including all persons ineligible to citizenship) shall apply to **persons** who were **born in the Philippine Islands** to the same extent as in the case of other foreign countries."* **(Emphasis added.)**

Section 5, **Philippine Government Act, ch. 1369, 32 Stat. 691 (1902)** : *"No law shall be enacted in said islands which shall deprive any person of life, liberty or property without **due process of law**, or deny any person therein the equal protection of the laws."*

xxxxx

*"That no ... **bill of attainder** shall be enacted."*

[Emphasis added.]

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1, Article XIII, **United States Constitution**: *"Neither **slavery** ... shall exist within the United States, or any place subject to their jurisdiction."* **(Emphasis added.)**

Section 1, Article XIV, **United States Constitution**: *"All persons **born ... in the United States**, and subject to the jurisdiction thereof, are citizens of the United States ..."*

*"Nor shall any State deprive any person of **life, liberty, or property** without **due process of law**; nor deny any person within its jurisdiction the **equal protection of the laws**."* **(Emphasis added.)**

Section 3, Article IV, **United States Constitution**: *"The Congress shall have Power **to dispose of** and make **all needful Rules** and Regulations respecting the territory or other Property belonging to the Unites States ..."* **[Emphasis added.]**

Statement of the Case

A. PETITIONER AND HER AMERICAN NATIONALITY

The jurisdiction of the Ninth Circuit Courts of Appeals was invoked under 28 U.S.C. Section 1291. At the time of the hearing of this case, no Court has as yet addressed whether persons "**born in a United States territory**" are born "**in the United States**" within the meaning of the Citizenship Clause of the Fourteenth Amendment.

Petitioner, **Merlita Pascua Summerfield,** was born in the Philippines on August 10, 1938, during the **territorial period** (December 10, 1898 - July 4, 1946).

Petitioner claims that:

(1) She was an **American citizen at birth**, and is still an American citizen, because she was born **"within a territory of the United States"** which is the same as being **"born ... in the United States"** within the meaning of the Citizenship clause of the Fourteenth Amendment. (Emphasis added.)

(2) In the **alternative**, she claims that since she was not an alien in the United States at birth - i.e., she was an **American national at birth** - Congress did not have the power to **automatically dissolve or revoke her American nationality** in the guise of making a **"needful rule"** respecting a Territory of the United States.

The main focus of Petitioner's claim is therefore **not on IMMIGRATION** but **on the PRESERVATION** of what she believes to be her citizenship or nationality status at birth and all the fundamental constitutional rights embraced by her citizenship or nationality.

Split Ruling on the First Claim

MAJORITY OPINION: Citing opinions based on the ***Insular Cases***, the majority opinion on the instant case rejected Petitioner's claim to American citizenship by birth within a **territory** of the United States on the ground that the term " within a territory of the United States" and the phrase " born ... in the United States" are **not the same**.

DISSENTING OPINION: However, Judge Harry Pregerson, dissented and asserted that the phrase " born .... in the United States" and the term " within the **territory** of the United States" are the same in the light of opinions in ***Wong Kim Ark*** **[169 U.S. 694 (1898)]** and in ***Englis v. Sailors' Snug Harbor [3 Pet. 99, 155 (1830)]***.

Therefore, Judge Pregerson concluded that persons born in the Philippines during the territorial period were "born ... in the United States" within the meaning of the Citizenship Clause of the Fourteenth Amendment. Hence, Judge Pregerson concluded that Petitioner is still an American citizen.

Unanimous agreement on part of the second claim: That she was "NO-AN-ALIEN-IN-THE-UNITED STATES" at the time her birth until July 4, 1946.

All three judges of the Ninth Circuit Court of Appeals before whom the case was argued, unanimously agreed that Petitioner was indeed **NOT AN ALIEN IN THE UNITED STATES AT THE TIME OF HER BIRTH**. ***They all agreed that she was born an "American national" - a slave-like status between alienage and full-fledged American citizenship***.

However, the **majority opinion ruled** that Section 14 of **the Philippine Independence Act of 1934 - which automatically dissolved or revoked Petitioner's American nationality status** and, consequently, automatically **dissolved** all the civil and political rights attached to her American nationality - was a **"needful rule"** within the meaning of Sec. 3, Article IV, of the Constitution. Hence - unlike an illegal alien in the United States or a green card holder - ***Petitioner was not entitled to due process of law prior to, or at the time of, the automatic dissolution of her birthright as an American national.***

There was no dissenting opinion on this second claim of the Petitioner.

Judge Pregerson may have overlooked this second claim, and made no dissenting opinion.

Pursuant to provisions of Article IX of the **Treaty of Paris,** which was ratified by the United States Congress on April 11, 1899, Congress was vested by the Executive Department with the authority to determine the **"civil rights"** and **"political status"** of the native inhabitants of the territories ceded by Spain to the United States, which included the Philippines.

This authority is based on Section 3, Article IV of the United States Constitution, which gives Congress the Power to make all **"needful rules"** respecting the Territory of the United.

However, the *Treaty of Paris* did not confer upon **Congress** the power to make a determination on the **"citizenship rights"** of the native inhabitants of the Philippines.

This was because the Office of the President of the United States, which negotiated the **Treaty of Paris**, knew that the citizenship rights of persons born in United States territories are determined, in the light of the rulings enunciated in the ***Slaughterhouse Cases***, by Constitution and not by Congress.

Nor does **Section 3 of Article IV of the Constitution** vest any specific power on Congress to determine the "**citizenship status**" of persons born in United States territory, subject to its jurisdiction, under its supreme sovereignty, and owing total and unconditional allegiance thereto.

Congress power was therefore **limited** to the determination of the inhabitants' "**political status**" and "**civil rights**". Congress was **not** empowered to determine the **citizenship status** of the inhabitants of the Philippine Islands.

Moreover, Congress' power was **further limited** by the phrase "make all **needful rules**" for the Territory of the United States. **The power to "denationalize" - which is not needful - is not consistent with the spirit of this constitutional mandate.** Nor is the act of creating a **"less-than-citizenship status"** - i.e. **American nationality - "NEEDFUL"**. Such an act is **not in harmony or consistent** with the constitutional term **"needful"**.

"**Needful**" means "***necessary, requisite, essential, indispensable.***" SEE *Riddell v. Pennsylvania R. Co.*, 262 Pa. 582, 106 A. 80, 81.

With this judicial definition on what is "**needful,**" ***the law denationalizing all American nationals in the Philippines was clearly not needful as it was not necessary, not requisite, not essential, and not indispensable.***

B. PETITIONER AND THE UNITED STATES

"CIVIL RIGHTS"

Pursuant to the authority vested upon Congress by Section 3,

Article 4 of the **United States Constitution**, and by article IX of the **Treaty of Paris**, **the whole gamut of civil and political rights [e.g., right to life, liberty and property, right to due process of law, and right to equal protection of the laws, right to free speech, right to assembly, right to religion, etc.] under the United States Constitution was extended to the native inhabitants of the Philippine Islands** through the instrumentality of Sections 4 and 5 of the **Philippine Bill of July 1, 1902 [Public No. 235]**; and Section 3 of the **Jones Law of August 29, 1916 [Public No. 240].**

Even the **Insular Cases** ruled ***that fundamental constitutional rights, which necessarily included citizenship rights, cannot be abridged in the United States territories.***

Except for the right to **jury trial,** which the Americans deemed not fit for Filipinos, most, if not all, civil rights enjoyed by full-fledged Americans were also enjoyed by Filipinos born and living in the Philippines during the territorial era. SEE *Dorr v. United States*, 195 U.S., 138.

"POLITICAL STATUS"

Under the sovereignty of the United States, the Philippines underwent three stages of political development, to wit: (1) **Military Rule** ; (2) **Commonwealth Status**; and (3) the **status as a politically "independent" country**. Pursuant to a constitutionally-vested authority, Congress' initial determination was to grant the Philippine Islands a **"political status"** known as **"Commonwealth of the United States of America."** Subsequently, Congress granted the inhabitants of the Philippine Islands an **"independent" political status** through the *Philippine Independence Act of March 24, 1934,* which paved the way for Philippine Independence, and which became the matrix of the actual grant of Philippine Independence on July 4, 1946. Historically and politically, the Philippines shifted from a **"Commonwealth Status"** [December 10, 1898 - July 4, 1946] to an **"independent political status."**

CITIZENSHIP RIGHTS OR STATUS

Congress never enacted a law clearly and specifically defining the **"citizenship rights or status"** of the inhabitants of the Philippine Islands during the territorial era.

Section 4 of *Philippine Bill of July 1, 1902* [Public No. 235] deals only with "**citizens of the Philippine Islands**" entitled to the protection of the United States.

Also, Section 2 of *Jones Law of August 29, 1916* [Public No. 240] again deals only with "**citizens of the Philippine Islands**."

Moreover, Section 14 of the *Philippine Independence Act of March 24, 1934,* describes native inhabitants of the Philippine Islands as **"persons born in the Philippine Islands"** period. [Note: Section 101 (a) (22) of the **Immigration and Nationality Act** defines the term "national of the United States" as " ... (b) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."]

The United States Congress has therefore failed to make an exact determination on the citizenship rights or status of the native inhabitants of the Philippine Islands. In fact the phrase "citizens of the Philippine Islands" was a status automatically given to the subjects of Spain who failed to preserve their allegiance to the Crown of Spain within the prescribed two-year period.

Assuming that the term **"citizens of the Philippine Islands"** applied to the native inhabitants of the Philippines, that simply meant the native inhabitants were statutorily declared full-fledged citizens of a territory of the United States (the Philippine Islands). And since **citizenship cannot exist without a sovereign power**, the Filipinos then could only be said to have been statutorily declared full-fledged Americans citizens, like the Guamenians and the Puerto Ricans.

True, the Philippine Islands was not then a State of the United States. But one does not have to be born in a State of the Union to be "born in the United States." For example, those born in the City of Washington, District of Columbia, are not born in a State of the Union but they are citizens of the United States.

That the Philippines was not an incorporated territory is irrelevant. The ***Doctrine of Territorial Incorporation*** was ***judicially-created, and such decisional rule has absolutely no basis in law or in the Constitution***. It is an obsolete **racist** judicial doctrine which has no place in modern times, and in the hearts and minds of civilized men and women.

However, many courts in the United States have determined - with dogmatic and absolute finality - the status of the native inhabitants of the Philippine Islands born during the territorial period as "non-citizen United States nationals" at birth (See *Alfafara v. Fross*, 26 C. 2d 358).

This means that all Filipinos born during the territorial period [December 10, 1898 - July 4, 1946] **were *not aliens*** in the United States (See *Gonzales v. Williams*, 192, U.S. 1, 13). ***At the very least, they were "quasi-citizens" of the United States - but they were definitely not aliens in the United States.***

Why were they "not aliens" in America? Because they gave their complete allegiance to the United States; they were under the supreme sovereignty of the United States; they were under the jurisdiction of the United States; they were bought by the United States for twenty (20) million dollars; they were owned by the United States; they were under the absolute disposal of the United States; their "government" was under the complete control and supervision of the United States; and the United States had the absolute power of life and death over the inhabitants of the Philippine Islands, as evidenced by the American extermination - or, ethnic cleansing, if you will - of close to a million Filipinos (between the period of 1898 and 1916) without facing any penological consequences.

However, ***the status of the Filipinos as "American nationals at birth" was deemed automatically terminated or dissolved or revoked by Section 14 of the Philippine Independence Act of March 24, 1934***. In other words, the Filipinos, who were American nationals at birth, were collectively denationalized by legislation.

All fundamental constitutional rights <u>INHERENT</u> in American nationality were taken away from them without cause and without due process of law.

The Immigration and Naturalization Service (INS) has justified this **"cruel and unusual act"** by labeling the provision on ***"collective denationalization"*** as a **"needful rule"** within the meaning of Section 3, Article IV of the Constitution. Furthermore, the INS (Immigration and Naturalization Service) reasoned, albeit wrongly, that Congress had the power to denaturalize aliens, collectively or individually, without cause and without due process of law.

This legal position is incorrect for two reasons:

<u>First,</u> denationalization (which refers to the divestment of the nationality of a person who is an American national at birth) is beyond the power of any government.

<u>Second</u>, denaturalization (which is the revocation of American citizenship granted to an alien through a naturalization proceeding) cannot be done without cause and due process of law.

<u>Denaturalization can only be done through judicial proceedings. Congress may pass a law granting citizenship to a group of persons. But, once granted, Congress cannot take the same citizenship away without due process of law. Congress does not even have the power to revoke a lawful permanent resident status (LPR) without due process of law.</u> Additionally, Congress does not have the authority to deport an illegal alien without due process of law. The power to denaturalize a naturalized citizen or deport an alien belongs to the courts.

C. PROCEEDINGS BEFORE THE COURTS

Petitioner, who was born in the Philippines in 1938, was a United States national at birth. See *Philippine Government Act*, ch. 1369, 32 Stat., 691 (1902). ***<u>She was a statutorily-declared full-fledged citizen of a territory of the United States of America.</u>***

And all courts - nay, all branches of government - are unanimous in the position that Petitioner had a "NON-ALIEN STATUS' in the United States at birth.

American citizenship at birth. Petitioner contends that ***because there is no constitutional provision for "national" status, and because the U.S. Government is estopped from repudiating its absolute legal position that she was not an alien at birth, she became a United States citizen at birth - and not merely a full-fledged citizen of a United States territory.***

However, the U.S. Ninth Circuit Court, invoking its decision in ***Rabang v. INS***, F. 3d 1449 (19th Cir. 1994) ruled that petitioner was not "born in the United States" within the meaning of the 14th Amendment. Therefore, she was not a United States citizen at birth.

American nationality at birth. Given the absolute legal position of the government that Petitioner was not an alien at birth - and considering the ***absence of a specific constitutional authority granting Congress the power to determine the "citizenship rights or status" of the Petitioner*** - Petitioner contends that Congress had no power to automatically revoke or dissolve her United States nationality acquired by birth in a U.S. territory, and based on her full-fledged citizenship in a U.S. territory (the Philippine Islands).

But the Ninth Circuit Court of Appeals rejected this argument saying, "it is well-settled that Congress is empowered 'to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country.' "

[Note again : The absolute legal position of the executive, legislative, and judicial branches of the United States government is : All Filipinos, including the petitioner, born during the territorial period were **NOT ALIENS** in the United States. Petitioner was a "quasi-citizen" of America, an "American national" or a "full-fledged citizen of a territory of the United States" of America (the Philippine Islands).]

Termination of U.S. nationality and due process of law. Petitioner contends that she was denied of her fundamental constitutional right to due process of law vested upon her through the instrumentality of the *Philippine Bill of July 1, 1902* and *Jones Law of August 29, 1916.* Petitioner further contends that all fundamental constitutional rights, **INHERENT** in nationality, were divested from her without cause and without due process of law.

Nevertheless, the Ninth Circuit Court of Appeals held that American nationality status acquired at birth can be automatically dissolved, revoked terminated by legislation, without the consent of the United States national, and without due process of law.

Bill of attainder and the automatic collective termination revocation, dissolution, and termination of U.S. nationality status by legislation. Finally, Petitioner contends that Section 14 of the Philippine Independence Act of March 24, 1934 was in effect a Bill of Attainder in the light of the Court's ruling in *Trop v. Dulles* [356 U.S. 86, 99-102 (1958)] that the revocation of ones nationality (U.S. citizenship) was a cruel and unusual punishment under the 8th Amendment of the United States Constitution.

In this case, therefore, denationalization as punishment for wartime desertion was held unconstitutional - as it was considered cruel and unusual punishment under the Eight Amendment.

However, the Ninth Circuit Court of Appeals held that the prohibition against **bills of attainder** does not apply to deportation statutes. By analogy, the Ninth Circuit Court of Appeals held that it does not apply to Section 14 of the *Philippine Independence Act of March 24, 1934* because Philippine citizens are **"aliens"** under immigration laws. [Note: This view is misleading because: First, we are not dealing here with a **deportation statute.** Rather, what is before us is a **denationalization statute**.

Also, the case at bar refers to the status of the Petitioner prior to the effective date of the Philippine Independence Act of March 24, 1934.

Prior to such date, Petitioner was not an alien in the United States. ***She was an "American national"; not an alien in the United States "; "quasi-citizen of America" or a "full-fledged citizen of a territory of the United States (the Philippine Islands.)]***

REASONS FOR GRANTING THIS PETITION FOR CERTIORARI

There is a great need for an authoritative voice of the Supreme Court in the instant case. Whether American nationals born in the Philippine Islands during the territorial period were " born ... in the United States" within the meaning of the Citizenship Clause of the Fourteenth Amendment is a constitutional issue which has never been squarely addressed by any court.

Moreover, whether American nationals are entitled to the fundamental constitutional right to due process of law prior to any act of denationalization is another issue which has not been clearly settled by any court.

Unless resolved - or settled with absolute judicial finality - by the United States Supreme Court, the federal constitutional issue on whether Filipinos, who were born during the territorial period, are still United States citizens - or, at least, American nationals - will haunt all courts - especially immigration courts and federal courts - in this country even beyond the 21st century.

This is especially because of the brilliant, long, well-researched dissenting opinion of Judge Harry Pregerson which shows beyond doubt the continuing American racist governmental policy against the Filipino people.

It is therefore extremely important that this petition for certiorari be granted. **Among others, Petitioners raises the following points:**

1. THE DECISION OF THE NINTH CIRCUIT COURT WAS ERRONEOUS

A. MEANING OF "BORN IN THE UNITED STATES." Being "born within the territory of the United States" is the same as being "born ... in the United States" within the meaning of the Citizenship Clause of the Fourteenth Amendment.

The majority opinion of the Ninth Circuit Court of Appeals overlooks the guiding light of common law, and the long jurisprudential history thereof, which shows that all persons born under the supreme sovereignty of the United States, subject to its total and absolute jurisdiction, and owing unconditional allegiance thereto, are citizens of the United States within the Citizenship Clause of the Fourteenth Amendment.

This principle of common law - i.e., citizenship by birth within the territory, and under the jurisdiction, of a sovereign power - has readily been accepted by the framers of the Constitution and the authors of the Fourteenth Amendment itself.

Looking back, the Citizenship Clause has never been squarely resolved under the so-called *Insular Cases*. *Downess v. Bidwell* [182 U.S. 244 (1901)], for instance, deals solely with the issue of whether the Revenue Clause should be applied to the territory of Puerto Rico. Nevertheless, this is the only *Insular Case* heavily relied upon by the majority opinion in *Rabang v. INS*, which was applied to the case at bar.

United States v. Wong Kim Ark [169 U.S. 649 (1898)], on the other hand, offers the clearest interpretation of the Citizenship Clause under the Fourteenth Amendment. Citing numerous common law sources and authorities, the case of ***Wong Kim Ark*** holds that all persons **"born within the TERRITORY of the United States"** and who owe allegiance to this country are deemed "natural born" for purposes of citizenship.

The first sentence of the Fourteenth Amendment, provides:

> "All persons **born** or naturalized **in the United States,** and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
>
> [Emphasis added.]

The phrase "born ... in the United States" includes persons who are not born in a State of the United States. Persons born in Washington, D.C. (District of Columbia) are not born in the State of a Union, but they are American citizens.

The District of Columbia is not a State but only a "territory of the United States." Yet all persons born therein are American citizens. Therefore, since the Philippines was "territory of the United States," all persons born therein during the territorial period were full-fledged citizens of the United States (as well as citizens of the Philippine Islands).

While it is true that the inhabitants of Puerto Rico and Guam have been granted United States citizenship by statute, such statutory grant of citizenship was completely unnecessary because all Guamenians and Puerto Ricans were American citizens at birth.[See **Organic Act of Puerto Rico**, ch. 145, Sec. 5, 39 Stat. 951, 953 (1917) (conferring United States citizenship on some Puerto Rican citizens); **Nationality Act of 1940,** ch. 876, Sec. 202, 54 Stat. 1137, 1139 (1940) (conferring citizenship on all those born in Puerto Rico after 1899); **Organic Act of Guam,** ch. 512, Sec. 4 (a) , 64 Stat. 384 (1950) (conferring citizenship on Guamenians).

Section 4 of the **Philippine Bill of 1902** declared the inhabitants of the Philippine Islands as "**citizens of the Philippine Islands**." [See **Philippine Government Act,** ch. 1369, 32 Stat. 691 (1902). Also, Section 2 of the **Jones Law of 1916** re-declared the inhabitants of the Philippine Islands as "**citizens of the Philippine Islands**." [See **Philippine Autonomy Act**, ch. 416, 39 Stat. 545 (1916).]

Knowing that ***citizenship cannot exist without a sovereign power***, Congress could only have meant that all Filipinos born during the territorial period to be citizens of the United States of America, and not merely citizens of a **territory** of the United States of America. Therefore, it could also be said that, like the Puerto Ricans and the Guamenians, Filipinos were also statutorily declared to be American citizens.

On its face, the above-quoted constitutional provision, otherwise known as the Citizenship Clause, does not clearly state who should be considered "born ... in the United States. Thus, in ***Minor v. Happersett,*** Chief Justice White suggested that resort must be made **somewhere else** to ascertain who should be considered "born in the United States." Following this suggestion, the Court, in ***Wong Kim Ark***, traced the United States' reliance on the common law rule of citizenship by birth from its origins in ***Calvin's Case***. [77 Eng. Rep. 377, 399 (Exch. Ch. 1608)]. In this case, all persons born within the king's allegiance, and subject to his protection, were considered subjects or citizens of his kingdom.

In the ***Slaughter House Cases***, 16 Wall. 36, (1873), the court stated that one of the main reasons for the Citizenship Clause was to **"put to rest"** the notion that "those ... who had been born and resided always in the District of Columbia or in the territories, though within the Unites States, were not citizens."(Emphasis added.)

In the light of the above-cited case, it is clear that **the Citizenship Clause of the Fourteenth Amendment was adopted after the Civil War to codify the common law and put control over citizenship by birth beyond the power of the legislature and the courts. Under the Fourteenth Amendment, persons may be citizens of the United States without regard to their citizenship of a particular state - i.e., the District of Columbia.**

In view of the above, reason and logic irreversibly leads us only to one reality: That persons born in the Philippines during the territorial era were born within the dominion of the United States and therefore "born in the United States" within the meaning of the Citizenship Clause of the Fourteenth Amendment.

B. COLLECTIVE OR INDIVIDUAL DENATIONALIZATION OF AMERICAN NATIONALS IS BEYOND THE POWER OF ANY CONGRESS OR ANY COURT. DENATURALIZATION, ASSUMING IT COULD APPLY TO PETITIONER, CANNOT BE DONE BY CONGRESS BECAUSE IT IS A JUDICIAL PROCESS WHICH NEEDS A JUST CAUSE AND A COURT HEARING. American nationality at birth is a birthright which cannot be collectively terminated by legislation without the consent of the nationals; without just cause; and without due process of law.

The Ninth Circuit Court of Appeals has failed to realize that what we are dealing here is ***not the "denaturalization of aliens who were naturalized as U.S. citizens."***

What we are dealing here is a ***"collective denationalization of American nationals at birth"*** who were ***never aliens in the United States on or before July 4, 1946***. This automatic collective denationalization of American nationals had the **effect** of divesting her of all fundamental constitutional rights **inherent** in her American nationality or statutorily extended to her as a full-fledged citizen of a U.S. territory.

Furthermore, what we are dealing here is ***not a mere deportation of an alien*** because ***petitioner has never been an alien in the United States*** on or before July 4, 1946. Therefore, the immigration laws in this country has nothing to do with the Petitioner on or before July 4, 1946.

Besides, petitioner contends she has never lost her American nationality, and that she has always remained an American national and, therefore, she claims she has never been an alien in the United States within the meaning of the citizenship clause of the 14th Amendment.

More specifically, the **majority opinion** of the Ninth Circuit Court of Appeals states in part : " ... it is well-settled that Congress is empowered 'to **exclude aliens** altogether from the United States, or to prescribe terms and conditions upon which they may come to this country.' "

This rule is not applicable to the petitioner because of the absolute legal position of all the branches of the U.S. government - executive, legislative, judicial - that she was not an alien at birth but an American national under the supreme sovereignty of the United States government, subject to its jurisdiction, and owing unconditional allegiance thereto.

In other words, we are dealing here with a person, who was DESIGNATED as a **full-blooded American national at birth** and then RE-DESIGNATED as **an alien by law**, without due process of law and without her consent. Petitioner is questioning the constitutionality of this **NON-NEEDFUL**, arbitrary, **destructive RE-DESIGNATION** which **destroyed all fundamental constitutional rights inherent** in her status as an American national at birth.

Stated otherwise, the U.S. government created the **fiction of American nationality** for Filipinos ***- a quasi-citizenship status - and then, when the Filipinos became a burden to the United States - the latter destroyed the fiction of American nationality, together with all the fundamental constitutional rights flowing directly therefrom without cause and without due process of law.***

In short, the **United States government transformed the Filipinos into slaves - or quasi-citizens - and then disposed of them at will when they ceased to satisfy American interest.**

There was, to be sure, a **collective slavery** and **collective denationalization of slaves, branded as American nationals**, in the Philippines.

Moreover, the Ninth Circuit Court of Appeals states that the creation of "national" status and the subsequent **automatic statutory re-designation** of the native inhabitants of the Philippine Islands **as "aliens"** is justified under Congress' constitutional power to make "needful rules respecting the territory.

This automatic statutory **RE-DESIGNATION** of American nationals at birth **as aliens** is not constitutionally permissible because it **violates the "NEEDFUL RULE" CLAUSE** of the Constitution. Rather, it is a **cruel and unusual rule.** It is a **racist** rule.

Besides, as stated ***supra***, even under Article IX of the **Treaty of Paris,** Congress was **ONLY** vested with the power to determine the "CIVIL RIGHTS" and "POLITICAL STATUS" of the native inhabitants of the Philippine Islands. Congress was never given the right to determine the CITIZENSHIP STATUS OR RIGHTS of the native inhabitants of the Philippine Islands.

And, as noted above, Congress has never made a categorical, specific description of the citizenship status of Filipinos born during the territorial period. If at all, they may have been described as "citizens of the Philippine Islands" which is incorrect because a person cannot be a citizen of a territory of the United States. A person can only be a citizen of a sovereign power like the United States.

Hence, those who were statutorily declared to be citizens of the Philippine Islands were necessarily declared American citizens of the United States, the sovereign power over the Philippine Islands.

True, the courts have come out with the **doctrine of territorial incorporation.** The courts have ruled that, since the Philippine was not territorially incorporated by Congress into the Union, all persons born therein during the territorial period are not citizens of the United States. **This judicially-created doctrine of territorial incorporation has absolutely no basis in law or in the constitution. By ratifying the Treaty of Paris on April 11, 1899, Congress has in effect territorially incorporated the Philippines as part of the United States of America.**

The categorization of Filipinos as "American nationals" mainly came from the courts which created a **new breed of slaves [American nationals],** who were neither aliens nor full-fledged citizens.

C. IF A PERSON IS NOT AN ALIEN, HE COULD ONLY BE A CITIZEN OF THE UNITED STATES. THERE IS NO OTHER STATUS IN BETWEEN EXCEPT SLAVERY. If the Filipinos were NOT ALIENS AT BIRTH, then they could only have been American citizens at birth within the meaning of the 13th Amendment.

Section 1 of Article 13 of the United States Constitution provides in part : " - **Neither slavery ... shall exist within the United States or any place subject to its jurisdiction."**

Slavery means : "The **condition of being a slave**; that civil relation in which one man has absolute power over the life, fortune, and liberty of another." [SEE **Black's Law Dictionary**, P. 1559.]

One of the conditions of being a slave is the fact of being less than a full-fledged American citizen. The Filipinos born during the territorial period were less than citizens. They were **DESIGNATED** and branded as "American nationals," which is a **NEW BREED OF AMERICAN SLAVERY.** They were judicially pronounced as "quasi-American citizens." And their homeland was placed under the absolute control, dominion, disposal, and ownership of America. Close to a million Filipinos were murdered by Americans, yet not a single murderer was penalized for a crime of murder.

This is slavery, plain and simple. America transformed the Philippine Islands into a nation of slaves; **created sub-human status such as "American nationality"** for Filipinos; and, when the Filipinos ceased to be useful to America, even their sub-human "quasi-American" citizenship or nationality was statutorily automatically dissolved, revoked or terminated without just cause, and without due process of law.

In effect, the phrases "American slaves" and "American nationals" are closely related to each other. ***American nationality status is a "quasi-citizenship status" which is an insult to the memory of 320,000 Americans who died during the Civil War in the hope that all men, regardless of color and creed, shall eventually and GENERICALLY be considered equal.***

To correct this historical error, this Court must conclude that the "NOT-AN-ALIEN STATUS" of the Petitioner was, and still is, the same as full-fledged American citizenship.

D. DUE PROCESS OF LAW. The Ninth Circuit Court of Appeals erred in holding that the Petitioner, who was an American national at birth, **did not** possess the right to due process of law upon the termination of his American nationality.

The Ninth Circuit Court of Appeals should have held that **American Nationality is more than property; more than liberty;** more than the pursuit of happiness. If the right to **DUE PROCESS OF LAW** was extended to natives of the Philippine Islands - if they could not be deprived of property without due process of law - **then Congress had no power to take away their American nationality without due process of law because AMERICAN NATIONALITY IS MORE THAN PROPERTY; MORE THAN LIBERTY; MORE THAN THE PURSUIT OF HAPPINESS. AMERICAN NATIONALITY WAS, AND STILL IS, PETITIONER'S LIFE ITSELF.**

Section 5, of the **Philippine Bill of July 1, 1902** states in part : **"No law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law."**

In the light of the ***Insular Cases***, American nationality at birth embodies the right to life, liberty, and property. American nationality contains the whole range of civil and political rights guaranteed under the United States constitution except that, according to a court's decision, it does not include the right to a jury trial.

Petitioner's right to life, liberty, and property was with her, and in her, at the very moment her American nationality was torn from her soul on July 4, 1946. In short, she was deprived of her right to life, liberty, and property while she was still an American national or, at least, while she was not yet considered an alien in the United States.

This act can only be justified by a **racist** judicial policy.

E. Bill of Attainder. Section 5 of the Philippine Bill of July 1, 1902 provides in part: "That no ... **bill of attainder** shall be enacted." [Emphasis added.] "Bills of attainder," as they technically called, are such special acts of the legislature as inflict capital punishment upon persons supposed to be guilty of high offenses such as treason and felony, without conviction in the ordinary course of judicial proceedings.

If an act inflicts a milder degree of punishment than death, it is called a "bill of pains and penalties," but they are included in the prohibition in the Federal constitution. [*Losier v. Sherman*, 157, Kan. 153, 138 P. 2d 272, 273; *State v. Graves*, 352 Mo. 1102, 182 S. W. 2d 46, 54.]

The Ninth Circuit Court of Appeals erred in NOT holding that Section 14 of the **Philippine Independence Act of March 24, 1934** was a bill of attainder. Again, the Ninth Circuit of Appeals states that bills of attainder does not apply to **deportation statutes**.

Section 14 of the **Philippine Independence Act of March 24, 1934 is not mere a deportation statute**. Rather, it is **DENATIONALIZATION STATUTE** to which the constitutional prohibition against bills of attainder is applicable.

In ***Trop v. Dulles***, cited **supra,** the Court ruled that denationalization is a cruel and unusual **punishment** under the 8th Amendment. Congress cannot denationalize anyone, even for wartime offenses such as desertion.

Denationalization is NOT as mild as deportation. In *Trop v. Dulles*, denationalization was held to be a cruel and unusual punishment violative of the Eight Amendment.

In sum, the **DESIGNATION** of Filipinos born during the territorial period as "American nationals" at birth and their subsequent **RE-DESIGNATION** as "aliens" was the **worst act of slavery perpetrated by the Congress against the Filipino people.**

Moreover, such an act can be categorized as the worse form of a ***"bill of attainder"*** because it inflicted punishment (denationalization) upon a group of people whose only crime was that they belong to the **brown race.**

To repeat, the petitioner was **not** DENATURALIZED by law. She was unconstitutionally DENATIONALIZED. She is not being deported. She is being PENALIZED AND DENATIONALIZED.

Besides, even ***collective denaturalization is not constitutionally permissible in the United States, either legislatively or judicially. Even individual denaturalization is a judicial process, beyond the reach of Congress.***

F. SECTION 14 OF THE PHILIPPINE INDEPENDENCE ACT OF 1934 IS VIOLATIVE OF THE CONSTITUTIONALLY-MANDATED "NEEDFUL RULE" STANDARD AND THEREFORE NULL AND VOID FROM THE BEGINNING.

By any constitutional standard, Section 14 of the Philippine Independence Act of 1934 is not a "needful rule" and therefore null and void from the beginning. **In a word, it violates the "NEEDFUL RULE" CLAUSE because it is "NON-NEEDFUL".** Hence, it is being null and void ab initio, Filipinos are still American citizens - or, at the very least - nationals of the United States of America.

G. EQUAL PROTECTION CLAUSE. The Ninth Circuit Court of Appeals overlooked the fact that the automatic statutory dissolution, revocation, and termination of Petitioner's American nationality status or non-alien status was violative of the "Equal Protection Clause" of the United States constitution.

As has been already stated, during or at the very moment of the termination of her status as American national, she was fully armed or equipped with all fundamental constitutional rights granted to her both by Congress and by the Constitution. Among these fundamental rights were the right to life, liberty, property, and the pursuit of happiness; the right to due process of law; the right to equal protection of the laws; the right to free speech, assembly, and religion; the right against cruel and unusual punishment; the right to be protected from the effects of bills of attainder; and, above **all else, the right to be protected by the United States against any unjust deprivation of any or all her fundamental rights.**

All these rights were also **STRIPPED** from her in violation of the "Equal Protection" clause.

Unfortunately, the government, from whom she expected the most consolation, did not give her any protection which she needed most. What she got was automatic denationalization which was an act of destruction and not protection.

Needless to say, an American national **at birth** ought to occupy a higher preferential political position than a "naturalized" alien. The fact is : An American national is an American **at birth**, and he/she should be given a preferential treatment in this country.

And the fact is : Only native born Americans can run for certain positions in the government, such as the Presidency. Naturalized aliens cannot - a prohibition which is another blow to the concept of **generic** equality among humans under the Constitution.

LONG PATTERN OF RACIAL DISCRIMINATION AGAINST THE FILIPINO RACE

This Court should be made aware of the fact that there is a long pattern of discriminatory acts inflicted by the United States government against the Filipino people. **Among others,** the following historical landmarks should be considered:

1. ABANDONMENT OF THE PHILIPPINES AFTER THE SECOND WORLD WAR. Instead of rebuilding the Philippines, the United States helped rebuild the economic empire of Japan after the Second World War.

2. PREFERENTIAL IMMIGRATION POLICY IN FAVOR OF JAPAN. The Japanese are currently given a 90-day automatic visas to the United States. Whereas the Filipinos have to beg and humiliate themselves for U.S. visas.

Yet the Japanese are former enemies of the United States, while the Filipinos have been, and still are, the most loyal allies of America.

3. AMERICA'S "RACIAL CLEANSING" OF CLOSE TO A MILLION FILIPINOS BETWEEN 1898 AND 1916. The American forces in the Philippines exterminated close to a million Filipinos who wanted to establish a free government. The actual reports on this depopulation campaign were signed by high-ranking officers of the United States Army.

Up to now, the American government has not taken any step to show some kind of remorse for the DEPOPULATION CAMPAIGN in the Philippines. At least, Japan has recently apologized to the Filipino people for W.W.II atrocities.

4. EXCLUSION OF HALF-AMERICAN FILIPINOS. In 1982, the United States Congress enacted **Public Law 97 - 352**. Under this law, half-American Vietnamese; half-American Kampucheans; half-American Laotians, half-American Thailanders, and half-American Vietnamese can enter the United States as immigrants - excluding all half-American Filipinos. Recently, corrective measures have been taken. But, initially, the half-American Filipinos were excluded.

5. NATURALIZATION OF FORMER AMERICAN NATIONALS, EXCLUDING FILIPINOS. It is of common knowledge that the Puerto Ricans and Guamenians, former American nationals, were naturalized as American citizens by legislation. The Filipinos were never clearly given this privilege.

6. MORE FAVORABLE POLICY TOWARDS PUERTO RICO. The administration of President George Bush gave the Puerto Ricans three choices: (1) Independence; (2) Statehood; and (3) Commonwealth status. The Filipinos were never given these choices.

7. FAVORABLE TREATMENT IN FAVOR OF SPANISH CITIZENS. Article IX of the Treaty of Paris granted Spanish citizens in the Philippines one year period - which was later extended to two years - within which to retain or preserve their Spanish citizenship. The Filipinos - despite their **"NOT-ALIENS-IN-AMERICA STATUS"** - were not given this right before, during, or after July 4, 1946.

8. GREEN CARD HOLDERS HAVE MORE RIGHTS THAN FILIPINO AMERICAN NATIONALS. Green card holders have more rights than Filipino American nationals at birth. Lawful permanent residents (or green card holders) cannot be divested of their status without due process of law.

The green cards cannot be taken away by legislation. Admittedly, these green card holders have more rights than the Filipinos who were born during the territorial era. The latter were stripped of their nationality without due process of law, and by legislation.

Even illegal aliens cannot be deported without due process of law. They have more rights than the American nationals born in the Philippine Islands during the territorial period.

II. THE QUESTIONS PRESENTED ARE EXTREMELY IMPORTANT

There is need for an exact definition of the term "born in the United States ". Who are "born in the United States?" Does this term include those who are born "within any territory of the United States?" If this Court determines that the American nationals in the Philippines, who were born during the territorial era, were NOT BORN IN THE UNITED STATES, then such a decision will **settle the issue with finality**, thereby preventing other American nationals from seeking judicial determination on their exact citizenship rights or status in the United States.

A FINAL DECISION ***on this extremely important constitutional issue will spare the American courts from the prospects of spending millions of dollars - and spending endless hours of research and court proceedings - in an effort to manage or dispose of Filipinos ' unending claim to regain their lost to American citizenship or nationality.***

New breed of slavery or new form of slavery in the guise of "American Nationality." This Court must rule on the issue of whether it is Constitutionally permissible for Congress to create **QUASI-CITIZENSHIP STATUS** such as **"AMERICAN NATIONALITY STATUS"** for persons under the **supreme sovereignty** and jurisdiction of the United States and owing unconditional allegiance thereto within the meaning of the Thirteenth Amendment.

Congress created in the Philippines a **new breed of slaves** known as **"American nationals"**. Why? Because "American nationality" is a status less than that of a full-fledged citizen but higher than that of an alienage. "American slaves" and "American nationals" are therefore almost synonymous within the meaning of the 13th Amendment. **Both "American nationals" and "American slaves" have lesser rights than American citizens.**

To repeat: Unless the issue of whether or not Filipinos are still American citizens - or, at least, American nationals - is completely resolved, all immigration courts and all federal courts of appeals in this country will always encounter Filipinos seeking judicial restoration of their lost American citizenship or American nationality.

For, indeed, the mass legislative denationalization of Filipino American citizens or nationals was a supreme act of racial humiliation brought to bear upon millions of kind-hearted, loyal and gentle people - and, nay, a demonstration of political irresponsibility unparalleled in the annals of civil-rights-respecting nations.

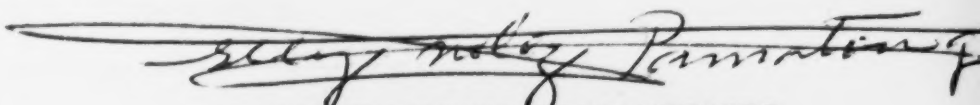
And, certainly, a law which sanctions this dehumanizing process of racial or ethnic cleansing, in wanton disregard of the constitutional guarantees against the abridgment of fundamental human birthrights without due process of law, cannot be considered "needful" nor "moral" nor "Christian" - nor "Constitutional". Rather, it is cruel and unusual punishment.

This Court must formally uphold the dicta in *Wong Kim Ark* and *Inglis* wherein this Court held that birth in a United States TERRITORY - SUCH AS WASHINGTON, D. C. - constitutes birth in the United States under the Citizenship Clause of the Fourteenth Amendment.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted by:



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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MERLITA PASCUA
SUMMERFIELD,

NO. 91-70424
I&NS No. A24 251 892

Petitioner

v.

U.S. IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.
_____/

Petition to Review a Decision of the
Immigration and Naturalization Service

Argued and Submitted October 8, 1992
San Francisco, California

Filed September 19, 1994

BEFORE: TANG, PREGERSON, and ALARCON, Circuit Judges.

Merlita Pascua Summerfield petitions for review of a Board of Immigration appeals decision upholding an order of deportation issued by an immigration judge. Summerfield contends that she is not subject to deportation because she is a United States citizen or national by virtue of her birth in the Philippines during the time that country was a United States territory. We deny the petition.

I.

Summerfield, who was born in the Philippines in 1938, was a United States national at birth. See Philippine Government Act, ch. 1369, 32 Stat. 691, 692 (1902) (deeming certain inhabitants of the Philippine Islands citizens of the Philippines and extending the protection of the United States); Rabang v. Boyd, 353 U.S. 427, 429 (1957). However, under the Philippine Independence Act of 1934, ch. 84, 48 Stat. 456 (1934), which provided for the adoption of a constitution and the withdrawal of the United States ten years afterward, citizens of the Philippine Islands lost their status as United States nationals and were considered "aliens" under the immigration laws as of July 4, 1946. Summerfield raises a number of constitutional challenges to the Philippine Independence Act and its application to her.

II.

Summerfield first contends that because there is no constitutional provision for "national" status, she became a United States citizen at birth. While Summerfield did not specifically argue that she was a citizen under the Citizenship Clause of the Fourteenth Amendment,[1] we hold in Rabang v. INS F. 3d_____ (9th Cir. 1994), that persons born in the Philippine Islands during the territorial period were not born "in the United States" under the Fourteenth Amendment.

III.

Second, Summerfield challenges Congress' power to divest Philippine-born individuals of their United States nationality.

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[1] All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. Amend. XIV.

However, it is well-settled that Congress is empowered "to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country.

Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quotation omitted). The creation of "natural" status and the subsequent designation of Philippine citizens as "aliens" under the immigration laws is within Congress' power to legislate regarding the territories, see U.S. Const. art. IV, 3 (giving Congress the power "to dispose of and make all needful rules and regulations respecting the territory . . . belonging to the United States"), and within the "plenary congressional power to make policies and rules for the exclusion of aliens." Kleindienst, 408 U.S. at 769. See also, Rabang, 353 U.S. at 432-33 ("Congress not only had, but exercised, the power to exclude Filipinos in the provision of 8 (a) (1) of the Independence Act . . ").

IV.

Summerfield next contends that she was divested of her United States nationality without procedural due process. She claims that she was entitled to an "order to show cause" specifying the grounds for the revocation of her United States nationality and proof that she had consented to that revocation (e.g. through voting to renounce her American nationality or enlisting in a foreign army against the United States in war). However, we have previously held that national status can be taken away by Congress without consent. See Manguerra v. INS, 390 F. 2d 358, 360 (9th Cir. 1968). Individual notice of loss of national status was not required: "The status of United States nationality for Filipinos was the direct result of the United States' assumption of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status." Cabebe v. Acheson, 183 F. 2d 795, 801 (9th Cir. 1950).

See also INS v. Pangilinan, 486 U.S. 875, 885 (1988) (Filipino nationals who served with the United States Armed Forces during World War II were not entitled as a matter of due process to individualized notice of statutory rights for naturalization)[2]

V.

Finally, Summerfield argues that 14 of the Philippine Independence Act of 1934 constituted an impermissible bill of attainder. However, "[t] he prohibition against . . . bills of attainder does not apply to deportation statues." Artukovic v. INS 693 F. 2d 894, 897 (9th Cir. 1982) (citation omitted). By analogy, neither does it apply to 14, which declared that Philippine citizens are "aliens" under the immigration laws.

PETITION FOR REVIEW DENIED.

Summerfield v. Immigration and Naturalization Service,
No. 91-70424

PREGERSON, Circuit Judge, dissenting:

For the reasons set forth in my dissent in Rabang v. Immigration and Naturalization Service, ___ F.3d __ (9th Cir. 1994), I dissent in this matter.

[2] We note that Summerfield does not argue that her due process rights were violated in the conduct of the deportation proceedings. Respondents in immigration proceedings are entitled to procedural due process. See Magallanes-Damian v. INS, 783 F. 2d 931 (9th Cir. 1986).

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MERLITA PASCUA SUMMERFIELD,

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v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.
_____/

No. 91-70424
I&NS No. A24 251 892

ORDER

BEFORE: TANG, PREGERSON, and ALARCON, Circuit Judges.

The members of the panel (Judges Tang, Pregerson and Alarcon) have voted as follows: Judges Alarcon and Tang vote to deny the petition for rehearing and recommend rejection of en banc suggestion. Judge Pregerson votes to grant rehearing and votes to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODOLFO RABANG; JOSE TION GUILLO; LEONORA VER SANIDAD; ALFREDO MAGLINAO; JOSEPHINE YCARO; MICHAEL YCARO; JOHN YCARO,

Plaintiffs-Appellants,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellee.

No. 91-16125

D.C. Nos.
CV 90-00154 HMF
90-00161 HMF
90-00162 HMF
90-00170 HMF
90-00176 HMF

OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
October 8, 1992—San Francisco, California

Filed September 20, 1994

Before: Thomas Tang, Harry Pregerson, and
Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Tang; Dissent by Judge Pregerson

SUMMARY

Immigration/Citizenship

The court of appeals affirmed a district court judgment. The court held that persons born in the Philippines during the

period when it was a territory of the United States were not born "in the United States" within the meaning of the Citizenship Clause, and are thus not entitled to United States citizenship by birth.

Appellants Rodolfo Rabang and six other individuals, all of whom were at some stage of deportation proceedings brought against them by appellee the Immigration and Naturalization Service (INS), sought a declaratory judgment that they were entitled to citizenship under the Citizenship Clause of the Fourteenth Amendment. The plaintiffs alleged that they or their parents were born in the Philippines during the period when the Philippines was a United States territory, that during this time the Philippine Islands were "in the United States," and that they were subject to the jurisdiction of the United States at their birth. They therefore claimed that they (or their parents) were born "in the United States" and thus constitutionally entitled to citizenship. The district court granted the government's motion to dismiss for failure to state a claim for relief. The plaintiffs appealed.

[1] The Citizenship Clause provides that all persons born "in the United States" are citizens of the United States. [2] Birth in the Philippines during the territorial period does not constitute birth "in the United States" under the Citizenship Clause, and thus does not give rise to United States citizenship.

[3] The Supreme Court previously decided that the territorial scope of the phrase "the United States" as used in the Constitution is limited to the states of the Union. [4] The Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty. [5] It is incorrect to extend citizenship to persons living in United States territories simply because the territories are "subject to the jurisdiction" or "within the dominion" of the United States, because those

persons are not born "in the United States" within the meaning of the Fourteenth Amendment.

Circuit Judge Pregerson dissented, stating that persons born in the Philippines during the territorial period should be considered United States citizens within the meaning of the Fourteenth Amendment's Citizenship Clause. Persons born in the Philippines during the territorial period indisputably were born within the dominion of the United States.

COUNSEL

Ronald T. Oldenberg, Honolulu, Hawaii, for the plaintiffs-appellants.

Lisa Dornell, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

TANG, Senior Circuit Judge:

Rodolfo Rabang and six other individuals appeal from the district court's dismissal of their complaints for failure to state a claim for relief. The complaints allege that plaintiffs or their parents were born in the Philippine Islands when those islands were United States territory, and seek declaratory judgments that plaintiffs are United States citizens under the Citizenship Clause of the Fourteenth Amendment, or under the Citizenship Clause in conjunction with § 301 of the Immigration and Nationality Act, 8 U.S.C. § 1401 (citizenship by descent). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

BACKGROUND

At the close of the Spanish-American War on December 10, 1898, Spain ceded the Philippine Islands to the United States by treaty. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. III, 30 Stat. 1754, 1755 (hereafter "Treaty of Paris").[1] That treaty provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Treaty of Paris, *supra*, art. IX, 30 Stat. at 1759.

The United States maintained military rule over the Philippine Islands until 1902. 2 R. Hofstadter, W. Miller & D. Aaron, *The American Republic* 340 (1959). Congress then enacted the Philippine Government Act, which established the terms of United States' civilian rule over the Philippines. *See* ch. 1369, 32 Stat. 691 (1902). That enactment provided that certain inhabitants of the Philippine Islands as of April 11, 1899 and "their children born subsequent thereto" were deemed "citizens of the Philippine Islands and as such entitled to the protection of the United States . . . ." § 4, 32 Stat. at 692. It also provided that the Constitution and laws of the United States would not apply to the Philippines.[2] § 1, 32 Stat. at 692.

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[1]By the same treaty, Spain also ceded to the United States the islands of Puerto Rico and Guam, and relinquished its sovereignty over Cuba. *See* Treaty of Paris, *supra*, arts. I, II, 30 Stat. at 1755.

The inhabitants of Puerto Rico and Guam have been granted United States citizenship by statute. *See* Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 951, 953 (1917) (conferring United States citizenship on some Puerto Rican citizens); Nationality Act of 1940, ch. 876, § 202, 54 Stat. 1137, 1139 (1940) (conferring citizenship on all those born in Puerto Rico after 1899); Organic Act of Guam, ch. 512, § 4(a), 64 Stat. 384, 384 (1950) (conferring United States citizenship on Guamanians). The United States never exercised sovereignty over Cuba, declaring instead that control over Cuba should be left "to its people." *See* H.R.J. Res. 24, § 4, 55th Cong., 2d Sess., 30 Stat. 738 (1898).

[2]The Philippine Government Act declared that "[t]he provisions of section [1891] of the Revised Statutes of [1878] shall not apply to the Philip-

In 1916, Congress adopted the Philippine Autonomy Act to "declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands." Philippine Autonomy Act, ch. 416, 39 Stat. 545 (1916). That act reiterated that "all inhabitants of the Philippine Islands who were Spanish subjects on [April 11, 1899] . . . and their children born subsequent thereto, shall be deemed . . . citizens of the Philippine Islands." § 2, 39 Stat. at 546.

Finally, thirty-five years after the United States acquired the Philippine Islands, Congress adopted the Philippine Independence Act. *See* Philippine Independence Act, ch. 84, 48 Stat. 456 (1934). That act provided for the adoption of "a constitution for the government of the Commonwealth of the Philippine Islands," § 1, 48 Stat. at 456, and for the complete withdrawal of United States sovereignty ten years after the adoption of a Philippine constitution. § 10(a), 48 Stat. at 463 (codified at 22 U.S.C. § 1394(a) (1990)). The act also declared that citizens of the Philippine Islands who were not also citizens of the United States were to be considered "aliens" under the immigration laws of the United States. § 8(a)(1), 48 Stat. at 462.

On July 4, 1946, the United States relinquished control over the Philippine Islands and declared them to be an independent sovereign, thus ending their status as a United States

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pine Islands." § 1, 32 Stat. at 692. Section 1891 of the Revised Statutes of 1878, in turn, provided that:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Rev. Stat. of 1878, ch. 1, § 1891, 18 Stat. 325, 333 (1874).

territory. *See* Proclamation No. 2695, 60 Stat. 1352, 11 Fed. Reg. 7517 (1946), *reprinted in* 22 U.S.C. § 1394 (1990).

DISCUSSION

I.

The government argued to the district court that the plaintiffs had failed to exhaust their administrative remedies. Although the government does not raise this issue on appeal, we must *sua sponte* consider whether there is subject matter jurisdiction over this appeal. *See McGuckin v. Smith*, 974 F.2d 1050, 1052 (9th Cir. 1992). Because the Board of Immigration Appeals has no jurisdiction to adjudicate constitutional issues, the plaintiffs' failure to raise their challenge at the administrative level does not deprive this court of jurisdiction. *See Hernandez-Rivera v. INS*, 630 F.2d 1352, 1355-56 (9th Cir. 1980).

II.

The district court consolidated these cases, and the government moved to dismiss them under Fed. R. Civ. P. 12(b)(6). The district court granted the government's motion to dismiss.

A dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and is reviewed *de novo*. *Buckey v. County of Los Angeles*, 968 F.2d 791, 793-94 (9th Cir.), *cert. denied*, 113 S. Ct. 599, 600 (1992). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* The decision of the district court may be affirmed on any ground supported in the record. *Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc), *cert. denied*, 113 S. Ct. 655, 656 (1992).

III.

All plaintiffs in this case are at some stage of deportation proceedings brought against them by the Immigration and Naturalization Service. Each complaint seeks declaratory judgment that the plaintiffs are entitled to citizenship under the Citizenship Clause of the Fourteenth Amendment. The plaintiffs allege that they or their parents were born in the Philippines during the territorial period, that during this time the Philippine Islands were "in the United States," and that plaintiffs were subject to the jurisdiction of the United States at their birth. They therefore claim that they (or their parents) were born "in the United States" and thus constitutionally entitled to citizenship.[3]

[1] The Citizenship Clause of the Fourteenth Amendment provides that:

> All persons *born* or naturalized *in the United States* and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

U.S. Const. amend. XIV (emphasis added).

No court has addressed whether persons born in a United States territory are born "in the United States," within the meaning of the Fourteenth Amendment.[4] The courts have,

[3]With respect to those who assert that their parents were born in the Philippines during the territorial period, the complaints also allege that these plaintiffs meet the applicable statutory requirements for acquisition of United States citizenship by descent. *See* 8 U.S.C. § 1401 (Supp. 1993). Because the district court's dismissal was based solely on the conclusion that birth in the territorial Philippines does not confer United States citizenship, this appeal does not concern any other issues related to citizenship by descent. *See* § 1401(c)-(g) (Supp. 1993) (listing the various conditions for citizenship by descent).

[4]This claim has been raised, but not addressed by the courts. *See, e.g., Resurreccion-Talavera v. Barber*, 231 F.2d 524, 525 (9th Cir. 1956); *Gancy v. United States*, 149 F.2d 788, 789 (8th Cir.), *cert. denied*, 326 U.S. 767 (1945).

however, uniformly rejected claims that people born in the Philippines during the territorial period retained their "national" status[6] after Philippine independence. *See, e.g., Rabang v. Boyd*, 353 U.S. 427, 430-31 (1957) (rejecting claim that status as a United States "national" was so related to "citizenship" that U.S. relinquishment of the Philippine Islands could not divest petitioner of his U.S. nationality); *Manguerra v. INS*, 390 F.2d 358, 360 (9th Cir. 1968) (rejecting argument that United States nationality could not be taken away without consent); *Cabebe v. Acheson*, 183 F.2d 795, 800 (9th Cir. 1950) (rejecting claim that Congress did not have power to divest petitioner of nationality).

[2] We now hold that birth in the Philippines during the territorial period does not constitute birth "in the United States" under the Citizenship Clause of the Fourteenth Amendment, and thus does not give rise to United States citizenship.

[3] In the *Insular Cases*[8] the Supreme Court decided that the territorial scope of the phrase "the United States" as used in the Constitution is limited to the states of the Union. Those cases addressed challenges to the imposition of duties on

[6]The term "national" came into popular use in this country when the United States acquired territories outside its continental limits, and was used in reference to noncitizen inhabitants of those territories. 4 Charles Gordon and Stanley Mailman, *Immigration Law and Procedure*, § 91.01[3][b], at 91-5 (1993). Nonetheless, Congress did not define that term until 1940. *See* Nationality Act of 1940, *supra* note 1, §§ 101(a), 204, 54 Stat. at 1137, 1139; 4 C. Gordon and S. Mailman, *supra*, § 91.01[3][b], at 91-5. The current definition of the term "national" was adopted in the Immigration and Nationality Act of 1952, ch. 477, § 101(a)(22), 66 Stat. 163, 169 (1952), and is codified at 8 U.S.C. § 1101(a)(22) (1990) (a "national" is a citizen of the United States and a person who, though not a citizen, owes permanent allegiance to the United States).

[8]*De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); and *Downes v. Bidwell*, 182 U.S. 244 (1901). The holdings of the *Insular Cases* were recently reaffirmed by the Supreme Court and remain valid law. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990).

goods shipped from Puerto Rico to the continental United States. The Court held that Puerto Rico was "not a part of the United States within the revenue clauses of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). *See* U.S. Const. art I, § 8 ("all duties, imposts, and excises shall be uniform *throughout the United States*") (emphasis added).[7]

[4] In arriving at this conclusion, the Court compared the language of the revenue clause ("all duties . . . shall be uniform throughout the United States") with that of the Thirteenth Amendment (prohibiting slavery "within the United States, *or* in any place subject to their jurisdiction") and the Fourteenth Amendment (extending citizenship to those born "in the United States, *and* subject to the jurisdiction thereof"). *Id.* at 251 (emphasis added). The Court emphasized that the language of the Thirteenth Amendment demonstrates that "there may be places within the jurisdiction of the United States that are no part of the Union." *Id.* In comparison, the Fourteenth Amendment has "a limitation to persons born or naturalized in the United States *which is not extended to persons born in any place 'subject to their jurisdiction.'* " *Id.* (emphasis added). Like the revenue clauses, the Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 291 n. 11 (1990) (Brennan, dissenting) (distinguishing *Downes* holding regarding the revenue clauses, because the Fourth Amendment "contains no express territorial limitations").

The *Downes* Court further stated: "[I]n dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories

[7]Regarding application of other constitutional provisions to Puerto Rico and the Philippines, *see also, Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr v. United States*, 195 U.S. 138 (1904); and *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

subject to the jurisdiction of the Federal government, wherever located." *Downes*, 182 U.S. at 263. In other words, as used in the Constitution, the term "United States" does not include all territories subject to the jurisdiction of the United States government. *See also Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 588 n. 19 (1976), *citing* H.R. Rep. No. 249, 56th Cong., 1st Sess., 16 (1900) ("upon reason and authority the term 'United States' as used in the Constitution, has reference only to the States that constitute the Federal Union and does not include the Territories.")

[5] It is thus incorrect to extend citizenship to persons living in United States territories simply because the territories are "subject to the jurisdiction" or "within the dominion" of the United States, because those persons are not born "in the United States" within the meaning of the Fourteenth Amendment.[6]

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[6]We note that the territorial scope of the phrase "the United States" is a distinct inquiry from whether a constitutional provision should extend to a territory, *see Downes*, 182 U.S. at 249, and we rely on the *Insular Cases* only to determine the meaning of the phrase "in the United States." While we are mindful of plaintiffs' claims that the district court erroneously excluded expert evidence regarding the history of the acquisition of the Philippine Islands and the racist sentiments that motivated the United States' treatment of the Philippines and the *Insular Cases*, we affirm the district court's dismissal on an issue of law only.

Because we conclude that birth in the Philippines does not give rise to citizenship under the Fourteenth Amendment, we need not decide whether citizenship is a "fundamental right" which would extend of its own force to a territory under the "territorial incorporation" doctrine.

We hasten to add that if the plaintiffs were entitled to citizenship under the Fourteenth Amendment, this would not conflict with Congress' constitutional power to regulate naturalization, as urged by the government. The power to confer citizenship through naturalization does not confer the power to take citizenship away. *See Wong Kim Ark*, 169 U.S. at 703 (Congress has no authority to restrict the effect of citizenship by birth); *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (same).

IV.

The dissent relies on dicta in two Supreme Court cases to conclude that birth in a United States territory constitutes birth "in the United States" under the Fourteenth Amendment. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court held that a person born in San Francisco, California, of Chinese parents, could not be excluded from the United States under the Chinese Exclusion Acts after a temporary visit to China. The Supreme Court held that the Citizenship Clause confers citizenship "by birth within the territory." *Id.* at 693. In *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 155 (1830), Mr. Justice Story in his concurring and dissenting opinion to the majority opinion explained that citizenship by birth arises by "birth locally within the dominions of the sovereign; and . . . birth within the protection and obedience . . . of the sovereign."

Focusing upon the phrases "within the territory" and "within the dominions," the dissent concludes that persons born in territories of the United States are born "in the United States." As previously discussed, the Supreme Court has already interpreted the territorial scope of the phrase "the United States" as used in the Constitution as limited to the states of the Union. Moreover, the dissent elevates the significance of this dicta in these cases.

There is no indication that the Court in *Wong Kim Ark* and *Inglis* would have used such broad language had it been faced with the facts of the case before us. *Wong Kim Ark* involved a person born in San Francisco, California. The fact that he had been born "within the territory" of the United States was undisputed, and made it unnecessary to define "territory" rigorously or decide whether "territory" in its broader sense (i.e. outlying land subject to the jurisdiction of this country) meant "in the United States" under the Citizenship Clause. The outcome in *Inglis* also did not depend on the meaning of "in the United States." Decided *prior* to the enactment of the Four-

teenth Amendment, that case addressed whether a person born in the colonies prior to the Declaration of Independence, whose parents remained loyal to England and left the colonies after independence, was a citizen and thus capable of inheriting land in the United States. It was simply unnecessary to address the territorial scope of citizenship under common law.

A focus on these select phrases is also misleading in view of the ambiguous ways in which the Court at other places defines the territorial scope of citizenship. *See Wong Kim Ark*, 169 U.S. at 658 (under the English common law rule, "every child born *in England* of alien parents was a natural-born subject") (emphasis added)[6]; *id.* at 661 ("[p]ersons who are born *in a country* are generally deemed citizens and subjects of that country") (emphasis added; citation omitted); *id.* at 665 ("[t]he right of citizenship . . . is incident to birth *in the country*") (emphasis added; citation omitted). *But see, id.* at 666 ("mere birth *within the realm* gives the rights of a native-born citizen") (emphasis added; citation omitted); *id.* at 667 (discussing the "ancient rule of citizenship by birth *within the dominion*") (emphasis added); *id.* at 674 ("the fundamental rule of citizenship by birth *within its sovereignty*") (emphasis added); *id.* at 675, 688 (reaffirmation by the Fourteenth Amendment of citizenship by birth "*within the dominion*") (emphasis added).

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[6]Wholesale importation of British common law on "subject" status to interpret the meaning of the Citizenship Clause is inadvisable because of possible differences between "subjects" and "citizens." The Supreme Court has given inconsistent pronouncements on whether the concept of "subject" and "citizen" are the same. *See Wong Kim Ark*, 169 U.S. at 656 ("subject" or "political status" may be quite different from "citizenship" or "civil status"); *Chisholm v. Georgia*, 2 Dall. 419, 455 (1793) ("Under [the] constitution, there are *citizens*, but no *subjects*."). *But see Wong Kim Ark*, 169 U.S. at 664 ("The term 'citizen' . . . is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government."), and *id.* at 665 ("Subject and citizen are, in a degree, convertible terms *as applied to natives*.") (emphasis added; citation omitted).

A selective focus on language supporting a broad interpretation of the Citizenship Clause is an unjustified reliance on dicta. The Court in *Wong Kim Ark* cautioned against the use of dicta in determining the meaning of "subject to its jurisdiction" in the Fourteenth Amendment: "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." 169 U.S. at 679. Neither *Wong Kim Ark* nor *Inglis* decided the meaning of "in the United States" in the Fourteenth Amendment.

CONCLUSION

The Philippine Islands are now a sovereign nation. Supreme Court precedent compels a conclusion that persons born in the Philippines during the territorial period were not "born . . . in the United States," within the meaning of the Citizenship Clause of the Fourteenth Amendment, and are thus not entitled to citizenship by birth.

AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

In determining that the Fourteenth Amendment Citizenship Clause requires that a person be born in the states of the Union, the majority opinion incorrectly relies on very limited language from the Revenue Clause of Article I, Section 8 of the Constitution and on just one of the *Insular Cases*. This narrow approach overlooks principles of common law, readily accepted by the framers of the Constitution and the authors of the Fourteenth Amendment, which demonstrate that the Citizenship Clause applies to all persons who owe allegiance to,

and are born within the territory or dominion of, the United States.

The majority opinion looks for support to only one of the *Insular Cases*, i.e., *Downes v. Bidwell*, 182 U.S. 244 (1901). *Downes*, which extensively discusses the history and meaning of the Revenue Clause, does not purport to interpret the Citizenship Clause, or any other provision of the Constitution. And, the majority opinion acknowledges in footnote 8 that the issue of territorial scope of the phrase "in the United States" as found in the Citizenship Clause is not an issue in *Downes*, which was concerned solely with whether the Revenue Clause applied to the territory of Puerto Rico.

Further, the Revenue Clause, on which the majority opinion heavily relies, states:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

The history, meaning, function, and subject matter of the Revenue Clause clearly differ from those of the Citizenship Clause. In short, neither *Downes* nor the Revenue Clause has anything to do with the citizenship status of a person born in a United States territory.

But more importantly, the history of the Fourteenth Amendment and its jurisprudence demonstrate unequivocally that the framers intended the term "in the United States" to refer to all persons born within United States' territory. Far from providing "ambiguous" dicta as the majority opinion suggests, the Supreme Court's exhaustive opinion in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), makes clear that the Fourteenth Amendment was intended to codify exist-

ing common law on the subject of United States citizenship. In addition, *Wong Kim Ark* cites numerous common law sources and authorities which indicate that all persons born within the *territory* of a sovereign nation and who owe complete allegiance to that nation are deemed "natural born" for purposes of citizenship. Thus, I would hold that persons born in the Philippines during the territorial period—between December 10, 1898 and July 4, 1946—should be considered United States citizens within the meaning of the Fourteenth Amendment's Citizenship Clause.

DISCUSSION

As the majority opinion notes, since 1946 persons born in the Philippines during the territorial period have unsuccessfully advanced various theories to establish that they were not "aliens" with respect to the United States. Many of these plaintiffs (as well as the courts) assumed that persons born in the Philippines during the territorial period acquired status only as United States "nationals" at birth. *See, e.g., Rabang v. Boyd*, 353 U.S. 427, 430 (1957); *Manguerra v. INS*, 390 F.2d 358, 360 (9th Cir. 1968); *Cabebe v. Acheson*, 183 F.2d 795, 800 (9th Cir. 1950); *Gancy v. United States*, 149 F.2d 788, 789 (8th Cir.), *cert. denied*, 326 U.S. 767 (1945). What is significant about these earlier cases is that the courts, without considering the Citizenship Clause, *assumed* that the United States was free to grant or withhold citizenship to the people of the Philippines while the Islands were under the complete dominion and control of the United States.[1]

In the case before us, however, Plaintiffs seek declaratory and injunctive relief under a *new* theory which directly chal-

[1]Although Congress may grant citizenship, it is indisputable that it does *not* have the power to take it away. *See Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (the Constitution grants the government "no power, even under its express power to pass a uniform rule of naturalization," to revoke United States citizenship).

lenges the constitutional validity of this earlier assumption.[2] Plaintiffs contend that by virtue of their birth, or their parents' birth, in the Philippines during the territorial period, they qualify as United States citizens under the Citizenship Clause of the Fourteenth Amendment. The District Court dismissed Plaintiffs' cases without analyzing this new claim of citizenship based on the Fourteenth Amendment. Instead, the District Court observed that the earlier cases were unanimous in their view that persons born in the Philippines during the territorial period were United States nationals, not citizens, and refused to "rewrite the law" regarding the status of persons born in the Philippines.

But a careful examination of the history underlying the passage of the Fourteenth Amendment and the common law underlying our Constitution leads me to conclude that the Dis-

[2]We found only two published decisions in which this issue was raised. In a case before this Court, a plaintiff claimed citizenship under the Fourteenth Amendment based on his birth "in the Philippine Islands at a time when the United States exercised sovereignty over those possessions." *See Resurreccion-Talavera v. Barber*, 231 F.2d 524, 525 (9th Cir. 1956). We did not, however, address this claim. Rather, after stating plaintiff's contention, we merely declared that plaintiff's birth in the Philippines in 1934 accorded him the status of a "non-citizen national." *Id.* In so doing, we relied on two earlier decisions by this court concerning a related, but distinct issue, and did not address the Fourteenth Amendment claim. *Id.* Because the court in *Resurreccion-Talavera* ignored the plaintiff's Fourteenth Amendment claim, that decision has no precedential effect on this issue.

In an unrelated administrative proceeding, the Board of Immigration Appeals did address this very issue. *See Matter of Hermosa*, 14 I. & N. Dec. 447 (1973). In that case, plaintiff argued that, under the Fourteenth Amendment, she acquired United States citizenship by birth in the Philippines in 1943. In rejecting Hermosa's argument, the Board relied on the *statutory* definition of the term "the United States" adopted as part of the Nationality Act of 1940, *see* § 101(d), 54 Stat. at 1137. The Board reasoned that because the Philippines were not among the geographic areas listed in that statutory definition, Hermosa was not born "in the United States" within the meaning of the Fourteenth Amendment. 14 I. & N. Dec. at 448-49.

trict Court and the majority opinion wrongly decided Plaintiffs' citizenship claim. I submit that persons living in the Philippine Islands who owed complete allegiance to, and were under the complete dominion and control of, the United States during the territorial period are constitutionally entitled to citizenship under the Fourteenth Amendment.

The first sentence of the Fourteenth Amendment, Section 1 (the "Citizenship Clause") provides that:

> All persons *born* or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

U.S. Const. amend. XIV (emphasis added). The critical issue presented in this case is whether persons born in the Philippine Islands during the period those islands were United States territory were "born . . . in the United States" within the meaning of the Fourteenth Amendment.[3]

I agree with the majority opinion that, to determine whether Plaintiffs' complaints state a claim for relief, we must first define the term "in the United States" as used in the Citizenship Clause. In defining that term, the majority opinion incorrectly relies on the Revenue Clause and on limited language in *Downes* to conclude that the Fourteenth Amendment applies only to the states of the Union. Such a conclusion ignores a large body of common law summarized in *Wong Kim Ark* which indicates that the Citizenship Clause confers citizenship by birth within the territory of the sovereign nation. Additionally, assuming that the reasoning in *Downes* applies, I would still dissent because I believe that the right to citizenship by birth is among those fundamental constitu-

[3]Neither the Government nor the majority opinion contends that Plaintiffs were not "subject to the jurisdiction" of the United States at their birth, within the meaning of the Citizenship Clause.

tional rights which must apply by their own force even under *Downes*.

A. Meaning of the Citizenship Clause

As the majority opinion notes, the words of the Fourteenth Amendment do not define on their face the meaning of the phrase "in the United States" to determine the right to citizenship by birth. Therefore, that scope should not be determined without recourse to the history and purposes of the Fourteenth Amendment. Based on the Revenue Clause and dicta from *Downes*, the majority opinion expresses the view that Congress may deny citizenship to persons born in the United States' territories because birth outside of the states of the Union is not covered under the Fourteenth Amendment. This view does not square with the intentions of the authors of the Fourteenth Amendment, nor with the plain language of the cases that have actually addressed the Citizenship Clause.

United States v. Wong Kim Ark, decided by the United States Supreme Court nearly a century ago, discusses at length the importance and status of the common law rule of citizenship by birth in determining the meaning of the Citizenship Clause. Thus, *Wong Kim Ark* must guide our determination of whether the Citizenship Clause confers United States citizenship on persons born in the Philippine Islands during the territorial period. In *Wong Kim Ark*, the Court held that a person born in the United States, of parents born in China, could not be excluded from the United States under the Chinese Exclusion Acts. In reaching its decision, the Court exhaustively examined the meaning and scope of the Citizenship Clause. At the outset, the Court discussed the importance of the common law in interpreting the Fourteenth Amendment.

> The constitution nowhere defines the meaning of these words [of the Fourteenth Amendment], either by way of inclusion or of exclusion . . . . [I]t must

> be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution. . . .
>
> In *Minor v. Happersett*, Chief Justice Waite, when construing, in behalf of the court, the very provision of the fourteenth amendment now in question, said: "The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that." And he proceeded to resort to the common law as an aid in the construction of this provision.

(Citations omitted.) 169 U.S. at 654-55.

In *Wong Kim Ark*, the Court then traced the United States' reliance on the common law rule of citizenship by birth from its origins in *Calvin's Case*. 77 Eng. Rep. 377, 399 (Exch. Ch. 1608). That case established that a person's status as a natural-born subject[4] requires that (1) the person's birth occur within the bounds of the King's *dominion* and (2) that the parents owe obedience to the King at the time of the child's birth. *Id.* at 655. Further, in *Wong Kim Ark* the Court stated:

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "ligealty," "obedience," "faith," or "power"—of the king. *The principle embraced all persons born within the king's allegiance, and subject to his protection.*

Id. (Emphasis added.) Continuing its analysis, the Court noted:

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[4]"The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government." *Wong Kim Ark*, 169 U.S. at 664.

> Mr. Dicey, in his careful and thoughtful Digest of the Law of England with Reference to the Conflict of Laws, published in 1896, states the following propositions . . . . " 'Natural-born British subject' means a British subject who has become a British subject at the moment of birth. Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject. This rule contains the leading principle of English law on the subject . . . ."

Id. at 657.[8]

The Court in *Wong Kim Ark* then noted that the above quoted rule was adopted by the English Colonies and was implicitly incorporated by the framers into the original Constitution: "The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established." 169 U.S. at 658.

> "Before our Revolution, all free persons born *within the dominions* of the king of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens. . . . The sovereignty has been transferred from one man to the collective body of the people; and he

[8]The noted exceptions were: "(1) Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien. (2) Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the crown by the sovereign of a foreign state is (though born within the British dominions) an alien." *Id.* at 657-58. The reason for these exceptions is that a person born under either of these circumstance does not owe allegiance to the sovereign nation in whose territory that person is born.

who before was a 'subject of the king' is now a 'citizen of the state.' " [Quoting *State v. Manual*, (1838) 4 Dev. & B. 20, 26.]

> That all children, born *within the dominion* of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted . . . .

Id. at 664-65 (emphasis added).

Following an extensive review of the cases and commentaries focusing on the definition of citizenship spanning three centuries,[6] the Court in *Wong Kim Ark* stated: "There is, therefore, little ground for the theory that at the time of the adoption of the fourteenth amendment of the constitution of the United States there was any settled and definite rule . . . inconsistent with the ancient rule of citizenship by birth *within the dominion*." *Id.* at 667 (emphasis added). In sum, the Court stated that it was "irresistibly" led to conclude that the Citizenship Clause "affirms the ancient and fundamental rule of citizenship by birth *within the territory*, in the allegiance and under the protection of the country . . . ." 169 U.S. at 693 (emphasis added).[7]

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[6]*Wong Kim Ark* also cites the *Commentaries* of Chancellor Kent, 2 Kent, Comm. (6th Ed.) 39, 258, wherein Chancellor Kent stated: "And if, at common law, all human beings born within the ligeance of the king, and under the king's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States in all cases in which there is no express constitutional or statute declaration to the contrary." *Wong Kim Ark* at 665.

[7]The Court's conclusion accords with the understanding expressed by Congressman Broomall of Pennsylvania, with respect to the nearly identical language adopted as part of the Civil Rights Act of 1866, Rev. Stat. § 1992, ch. 31, 14 Stat. 27 (1866):

> The first provision of the bill declares that all persons born in the United States, and not subject to any foreign Power, are citi-

Finally, the Court applied this established common law view to the passage of the Fourteenth Amendment and concluded that:

> In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the *dominion* was reaffirmed in the most explicit and comprehensive terms. . . .
>
> As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens . . . who would thereby have become citizens according to the law existing before its adoption.

Id. at 675-76 (emphasis added).

Writing in a pre-Fourteenth Amendment case,[8] *Inglis v.*

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zens of the United States. As a positive enactment, this would hardly seem necessary. Even as a declaration of existing law, a proposition that at most can only be said to embrace the true meaning of the word "citizen" would seem to find its more appropriate place in the elementary treatises upon law rather than upon the statute books.

Cong. Globe, 39th Congress, 1st Sess. 1262 (1866) (Congressman Broomall). *See also* 4 C. Gordon and S. Mailman, *supra* note 3, §§ 92.03[1][a], [b]:

> The ancient and indisputable citizenship rule of the British common law was the *jus soli*, under which a person's nationality is determined by the place of his birth. . . . It is clear, of course, that the American colonies and the nation they ultimately established had accepted the precepts of the English common law, as part of the heritage from the mother country.

[8] *See also Gardner v. Ward*, 2 Mass. 244 (1805). The Supreme Judicial Court of Massachusetts, Mr. Justice (afterwards Chief Justice) Sewall, held that the determination of whether a man was a citizen or an alien was

Sailor's Snug Harbor, 3 Pet. 99 (1830), Justice Thompson in his majority opinion states: "It is universally admitted both in English courts *and in those of our own country*, that all persons born within the colonies of North America, while subject to the crown of Great Britain, were natural-born British subjects . . . ." *Id.* at 120 (emphasis added). Justice Story, in his concurrence,[9] elaborates on this proposition further:

> Two things usually concur to create citizenship [by birth]: first, *birth locally within the dominions of the sovereign*; and, second, birth within the protection and obedience, or in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and, consequently, owe obedience or allegiance to, the sovereign . . . .

Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155 (1830) (Story, J., concurring) (emphasis added).

I provide such extensive detail and quotations from *Wong Kim Ark* and *Inglis* because the majority opinion dismisses out of hand any language from these case as nondispositive dicta, and states that the dissent selects "ambiguous" phrases

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"to be governed altogether by the principles of the common law," and "that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term 'citizenship.' "

[9]The majority complains that this citation comes from the dissent in *Inglis*. Justice Story dissented from a *different* section of *Inglis*. All of the Justices in *Inglis* agreed on the question at issue in the quoted section. *See, Wong Kim Ark*, 169 U.S. at 659.

and uses them in a "misleading" manner out of context. *See supra* majority opinion at 11403-11405. Contrary to this contention, the terms "territory," "dominion," and "sovereignty" appear dozens of times throughout *Wong Kim Ark* and *Inglis* when interpreting the right to citizenship under the Fourteenth Amendment. These decisions make clear the importance of the common law's interpretation of citizenship as applied under the Fourteenth Amendment, and the determination that citizenship must extend to all persons owing allegiance within the *territory or dominion* of the sovereign nation.

Thus, a careful reading of *Wong Kim Ark* and *Inglis* points to two conclusions. First, the term "in the United States," as used in the Citizenship Clause, means "within the dominion or territory of the United States." Second, the majority opinion directly contradicts the intention of the authors of the Fourteenth Amendment and frustrates the purpose of that amendment, by restricting the definition of natural-born citizen to those persons born in the states of the Union.

The majority's interpretation is also directly at odds with the Supreme Court's decision in the *Slaughter House Cases*, 16 Wall. 36, (1873), in which the Court examined the meaning and intention of the Citizenship Clause in light of the events that led to its ratification. *Id.* at 71. According to the Supreme Court, one of the main reasons the Citizenship Clause was adopted was to "put[ ] to rest" the notion that "those . . . who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens." *Id.* at 72. The Citizenship Clause was adopted after the Civil War precisely to codify the common law and put control of citizenship by birth beyond the power of the legislature and the courts. The Fourteenth Amendment "declares that persons may be citizens of the United States *without regard to their citizenship of a particular state* and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its

jurisdiction citizens of the United States." *Id.* at 73 (emphasis added).

B. United States' Dominion and Control

Applying what I believe is proper construction of the Citizenship Clause to the present case, the crucial question is whether between 1898 and 1946 the Philippine Islands were part of the United States' "dominion." Webster's New International Dictionary defines "dominion" as:

> That which is subject to sovereignty or control; specif.; . . . Territory governed, or over which authority is exercised; the tract, district, or country, considered as subject; as, the *dominions* of a king.

Webster's New International Dictionary of the English Language 769 (2d ed. 1940).[10]

The majority opinion does not argue that the Philippines were not within the "dominion" of the United States during the territorial period. Our government's conduct toward the Philippines during this period, as well as judicial decisions concerning the Philippines, confirm the obvious: that between December 10, 1989 and July 4, 1946, the Philippines were subject to the *complete sovereignty* of the United States and therefore were within the *dominion* of our nation.

Congressional enactments during the territorial period

[10]The definition of "dominion" contained in the Oxford English Dictionary is substantially the same:

> The territory owned by or subject to a king or ruler, or under a particular government or control. Esp. a country outside England or Great Britain under the sovereignty of or owing allegiance to the English or British crown; *spec. † (a) pl.* the English possessions in America; . . . .

IV Oxford English Dictionary 949 (2d ed. 1989).

made clear that the United States both maintained and exercised sovereignty over the Philippines during the territorial period. For example, Congress created a tripartite system of government in the Philippines, apparently modeled on our own.[11] However, Congress reserved ultimate control over these institutions to the United States, and the United States exercised this control except as to relatively insubstantial matters.

The United States, for example, retained and exercised substantial control over the Philippine executive branch. In 1916, Congress created the office of the Governor General, and vested the office with "supreme executive power." *See* § 21, 39 Stat. at 552. Congress authorized the President of the United States ("the President") to appoint the Governor General, and to "modify or vacate the action" of the Governor General. § 21, 39 Stat. at 552. The Governor General, in turn, was empowered to control all executive departments, to command the Philippine military, and to veto acts of the Philippine legislature. § 21, 39 Stat. at 552.

Congress reserved and exercised substantial control over the Philippine legislature, as well. Congress required the Philippine legislature to report to Congress all laws enacted by that legislature, and Congress reserved to itself and the President the power to annul those laws. § 19, 39 Stat. at 551; § 2(a)(11), 48 Stat. at 457; § 7(2), 48 Stat. at 461. Furthermore, statutes covering certain subjects could not take effect without the President's affirmative approval.[12] All enactments of the Philippine legislature were required to contain a clause that provided: "By authority of the United States be it enacted

[11] *See* Philippine Government Act, ch. 1369, 32 Stat. 691 (1902); Philippine Autonomy Act, ch. 416, 39 Stat. 545 (1916); Philippine Independence Act, ch. 84, 48 Stat. 456 (1934).

[12] *See*, § 13, 32 Stat. at 695-96 (disposition of land); § 10, 39 Stat. at 548 (tariffs, immigration, currency); § 2(a)(9), 48 Stat. at 457 (currency & coinage, imports & exports, and immigration).

by the Philippine Commission . . . . " § 1, 32 Stat. at 692. Moreover, the President appointed the members of the first Philippine legislative body. § 1, 32 Stat. at 691. Even after Congress permitted Filipinos to elect their own legislators, it restricted eligibility for legislative positions to those "owing allegiance to the United States." § 7, 32 Stat. at 694.

Our government also exercised extensive control over the Philippine judiciary. Congress created a judicial system, including a supreme court of the Philippines, § 9, 32 Stat. at 695, and the President was charged with appointing the chief and associate justices of that court, with the advice and consent of the Senate. § 9, 32 Stat. at 695; § 26, 39 Stat. at 555.[13] Furthermore, decisions of the supreme court of the Philippines were, with minor exceptions, reviewable by the Supreme Court of the United States. § 10, 32 Stat. at 695; § 27, 39 Stat. at 555; § 7(6), 48 Stat. at 462.

Even after Congress in 1934 provided for the creation of a constitutional government in the Philippines, it retained substantial ultimate control over the Philippine "Commonwealth."[14] Congress prescribed in fair detail the provisions of the Philippine constitution,[15] which was required to provide that all citi-

[13]Judges of the courts "of first instance" (trial courts) were appointed by the civil governor (and later by the Governor General) of the Philippines, by and with the advice and consent of the Philippine Commission. § 9, 32 Stat. at 695; § 26, 39 Stat. at 555. (However, the President appointed the civil governor, Governor General, and members of the Philippine Commission. § 1, 32 Stat. at 691; § 21, 39 Stat. at 552-53.)

[14]*See* Philippine Independence Act, ch. 84, 48 Stat. 456 (1934).

[15]Those provisions included (1) recognition of the United States' right to intervene in the governance of the Philippines, § 2(a)(14), 48 Stat. at 457; (2) recognition of the United States' right to expropriate Philippine lands and command the Philippine armed forces, § 2(a)(12), 48 Stat. at 457; (3) continuing review by the United States Supreme Court of decisions by the courts of the Philippines, § 2(a)(13), 48 Stat. at 457; and (4) continuing reports of all acts passed by the legislature to be reported to Congress, § 2(a)(11), 48 Stat. at 457.

zens of the Philippine Islands *owed allegiance to the United States*, and that every officer of the Philippine Commonwealth, before taking office, declare that "he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States." §§ 2(a)(1) & (2), 48 Stat. at 456.

Even during this period of increasing autonomy, Congress reserved enormous powers to the United States. For example, the President was authorized to veto any amendment to the Philippine constitution, § 7(1), 48 Stat. at 460-61, and retained the power to suspend the effect of any law, contract, or executive order of the Philippine Commonwealth. § 7(2), 48 Stat. at 461. The Philippine Islands' foreign affairs continued to be subject to the United States' "direct supervision and control." § 2(a)(10), 48 Stat. at 457.

In addition to this statutory record of United States sovereignty over the Philippines, numerous decisions have expressly recognized that after Spain ceded the Philippines to this country, those islands became part of the United States' dominion. For example, in *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901), the Supreme Court observed that upon Spain's cession of the Philippine Islands to the United States, those islands

> came under the *complete and absolute sovereignty and dominion of the United States*, and so became *territory of the United States* over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. *Their allegiance became due to the United States*, and they became entitled to its protection.

183 U.S. at 179 (emphasis added). Even after Congress created the Philippine "Commonwealth" in 1934, the Supreme

Court confirmed that the Philippine Islands continued to form part of the United States' "dominion":

> [I]t is contended that the passage of the Philippine Independence Act of March 24, 1934, and the adoption and approval of a constitution for the Commonwealth of the Philippine Islands have created a different situation; . . . . Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory.

Cincinnati Soap Co. v. United States, 301 U.S. 308, 319 (1937) (citation omitted). To the same effect is *Barber v. Gonzales*, 347 U.S. 637 (1954):

> From the Spanish cession in 1898 until final independence in 1946, the Philippine Islands were American territory subject to the jurisdiction of the United States. [ ] Persons born in the Philippines during this period were . . . entitled to the protection of the United States and conversely owing permanent allegiance to the United States.

347 U.S. at 639 n.1 (citation omitted).

In sum, these statutes and decisions demonstrate that the United States maintained and exercised sovereignty and control over the Philippine Islands and its inhabitants during the territorial period, and that the Philippine Islands were "within the dominion of the United States" during the territorial period.[10]

[10] *See also* Joseph R. Hayden, *The Philippines: a Study in National Development*, (New York: Macmillan Co., 1942). Hayden was vice-governor of the Philippine Islands from 1933 to 1935. In his work on the

Not surprisingly, some scholars writing around the time of our acquisition of the Philippines recognized precisely this outcome. *See, e.g.*, Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 406 (1899) ("the XIV Amendment would seem to make every child, of whatever race, born in any of our new territorial possessions [Guam, Puerto Rico, and the Philippines] after they become part of the United States, of parents who are among its inhabitants and subject to our jurisdiction, a citizen from the moment of birth.").

Thus, I conclude that the Philippine Islands were sufficiently under the dominion and control of the United States such that persons born in the Philippines between December 10, 1898 and July 4, 1946 were born "in the United States" within the meaning of the Citizenship Clause.

C. The Insular Cases

The majority opinion does not offer an alternate viewpoint of the common law or the history and purpose of the Fourteenth Amendment. Instead, the majority opinion contends that an inquiry into the development of the Fourteenth Amendment is unnecessary, because the Supreme Court determined unequivocally the meaning of the phrase "the United States" as used throughout the Constitution after it wrote its decision in *Wong Kim Ark*. The majority opinion bases this determination on the doubtful authority of one of a series of Supreme Court decisions referred to as the *Insular*

Philippines during the Commonwealth period, he observes that the Philippine Commonwealth was "more completely subject to ultimate Congressional control than an incorporated territory, like Alaska." *Id.* at 763. He also notes that the extent of the United States control over the Philippine Commonwealth far exceeded the control maintained by Britain over the members of British Commonwealth of Nations, which were considered British "dominions." *Id.*

Cases. See, e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901); *see also Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 n.30 (1976).

According to the *Insular Cases*, under the judicially-created doctrine of "territorial incorporation," the guarantees provided by the Constitution automatically apply in full force only to "incorporated" territories, i.e., those that Congress designates as destined for statehood.[17] *Flores de Otero*, 426 U.S. at 600 n.30. The only exception to this doctrine recognized in the *Insular Cases* is that certain " 'fundamental' constitutional rights" do apply even to inhabitants of "unincorporated territories," i.e., those territories not so designated by Congress as destined for statehood.[18] *Id.*

In the present case, the majority hangs its hat on an isolated reference to the Fourteenth Amendment from a lengthy fifty-seven page opinion in just one of the *Insular Cases*, i.e., *Downes v. Bidwell*, 182 U.S. 244 (1900). In *Downes*, the Court was called on to interpret the Revenue Clause of Arti-

[17]The majority opinion disavows any reliance on the doctrine of territorial incorporation in its footnote 8 where it states: "We note that the territorial scope of the phrase "the United States" is a distinct inquiry from whether a constitutional provision should extend to a territory . . . and we rely on the *Insular Cases* only to determine the meaning of the phrase "in the United States." This statement does not seem to make sense. The meaning of "in the United States" is not before us as an abstract concept. The issue before us is whether the Citizenship Clause extends to *a* territory. By disavowing but in effect adopting the reasoning of the *Insular Cases*, the majority opinion holds that Congress may deny citizenship to persons born in the Philippines because the Citizenship Clause only applies to a territory if it has been "incorporated" by statehood. Thus, the majority opinion does in fact rely on the doctrine of territorial incorporation in construing the Citizenship Clause of the Fourteenth Amendment.

[18]In *Dorr*, the Supreme Court held that the Philippine Islands were such an "unincorporated territory." 195 U.S. at 143 (Congress has "refrained from incorporating the Philippines into the United States").

cle I, Section 8 of the Constitution. Specifically, the Court considered "whether the *revenue clauses* of the Constitution extend of their own force to our newly acquired territories" such as Puerto Rico. 182 U.S. at 249 (emphasis added). In so doing, Justice Brown stated that "[t]he Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument . . . in the practical construction put upon it by Congress, and in the decisions of this court." *Id.* Relying heavily on the particular history of the Revenue Clause, the Court determined that, based on the doctrine of "territorial incorporation," the Revenue Clause does not apply to unincorporated territories.

Downes only interpreted the Revenue Clause. Yet, the majority opinion, without considering whether citizenship is a fundamental right, decides that the Fourteenth Amendment Citizenship Clause does not apply to unincorporated territories such as the Philippines. This determination is based on a brief and isolated reference in *Downes* to the Thirteenth and Fourteenth Amendments. Regarding the Thirteenth Amendment, the Court in *Downes* notes that it applies on its face not only to the United States, but to any place within the United States' jurisdiction ("within the United States, or in any place subject to their jurisdiction"). *Id.* at 251. The Court, in two sentences, then contrasts the Thirteenth and Fourteenth Amendments.

> Upon the other hand, the 14th Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the *state* wherein they reside." Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place "subject to their jurisdiction."

Id. (Emphasis in original.) Based on these brief references in *Downes* to the Thirteenth and Fourteenth Amendments, the

majority opinion concludes that the Fourteenth Amendment Citizenship Clause applies only to the states of the Union, not to unincorporated territories such as the Philippines.

The majority opinion's conclusion is incorrect for two reasons. First, the majority opinion's reliance on language in *Downes* which discusses the Thirteenth and Fourteenth Amendments is misplaced because *Downes* fails to address the dispositive issue now before this Court. The dispositive issue is: what does the phrase "*in* the United States" mean in the context of the Fourteenth Amendment. The dispositive issue in *not* whether the Fourteenth Amendment applies to persons born outside of the United States but otherwise subject to its jurisdiction. In short, regarding the Fourteenth Amendment, *Downes* only restates that a person must be born *in the United States*. *Downes* does not define for Fourteenth Amendment purposes what "*in* the United States" means.

Second, the majority opinion's interpretation of the Citizenship Clause overlooks the very advice given at the outset of *Downes* by Justice Brown. His advice directs us to look to the "nature of government created by" the Constitution, as well as "the decisions of this court." *Downes*, 182 U.S. at 249. In the present case, this can only by done by examining the history and common law behind the *Citizenship Clause*, not by looking to historical information concerning an entirely different provision —the *Revenue Clause*. Thus, by contravening the guidance provided in *Downes*, the majority opinion mistakenly resorts to the history of the Revenue Clause to determine the meaning and territorial scope of the Citizenship Clause.

Moreover, it is important to remember that the *Insular Cases* are a product of their time, a time when even the Supreme Court based its decisions, in part, on fears of other races. *See, e.g., Downes*, 122 U.S. at 282 (racial differences are among the difficulties Congress must face in annexing distant territories). Justice Harlan warns in his vigorous dis-

sent in *Downes* that the principles announced in that case could work "a radical and mischievous change in our system of government." *Downes*, 122 U.S. at 380 (Harlan J., dissenting). "The idea," Justice Harlan wrote, "that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord them—is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution." *Id.*

The Supreme Court has explicitly directed us not to expand the holdings or reasoning of the *Insular Cases*. In *Reid v. Covert*, the Supreme Court stated:

> The *Insular Cases* can be distinguished from the present case in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions wherein as here the *basis for governmental power is American citizenship*. . . . Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

354 U.S. 1, 14 (1957) (plurality opinion) (footnotes omitted).[10]

[10] *See also Harris v. Rosario*, 446 U.S. 651, 653 (1980) (Marshall, J., dissenting) ("the present validity of those decisions [in the *Insular Cases*] is questionable"); *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring) (questioning the "validity of the old cases such as *Downes v. Bidwell*, *Dorr v. United States*, and *Balzac v. Porto Rico*") (citations omitted); and *Flores de Otero*, 426 U.S. at 600 n. 31 (stating that *Reid v. Covert*, 354 U.S. 1 (1957) overruled the *Insular Cases*).

Thus, it is problematic for the majority opinion to rely *solely* on the *Insular Cases* to determine domestic constitutional rights other than those specifically addressed by those cases. I emphasize that neither *Downes* nor any of the other *Insular Cases* purport to address the territorial scope of the Citizenship Clause. As explained above, the history and purpose of the Fourteenth Amendment should be viewed from the perspective explicated at length in *Wong Kim Ark*, a case which focuses on the meaning of citizenship.

In sum, the majority opinion is the first to apply the doctrine of "territorial incorporation" as expressed in *Downes* and the other *Insular Cases* to determine the meaning of "the United States" as used elsewhere in the Constitution. Sadly, the majority opinion is the first to deny the benefits of the Citizenship Clause to persons born in a United States territory.

D. Citizenship as a Fundamental Right

Finally, even if the reasoning of the *Insular Cases* were applicable to the present case, I believe that the majority erred in *not* finding that the right to citizenship by birth is among those "fundamental constitutional rights [that] apply by their own force," according to the *Insular Cases*, throughout the dominion of the United States. *Flores de Otero*, 426 U.S. at 600 n.30.

In *Dorr*, the Court explained that certain constitutional provisions would apply of their own force even in the unincorporated territories:

> Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist by inference and the general spirit of the Constitution from which Congress derives all

its powers, than by any express and direct application of its provisions.

Dorr, 195 U.S. at 146 (quoting *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 44 (1890)).

The majority opinion, when it concludes that birth in the Philippines does not give rise to citizenship under the Fourteenth Amendment, ignores the requirement to determine whether citizenship is a "fundamental right." *See supra* majority opinion at 11402, fn.8. As discussed above, the *Insular Cases* hold that fundamental constitutional rights cannot be abridged in the United States territories. There is no dispute that the Philippines were a United States territory. Therefore, under the *Insular Cases* a court *must* decide if citizenship is a fundamental right *as well as* deciding whether citizenship is guaranteed under the Fourteenth Amendment to persons born in the Philippines.

Among those fundamental constitutional protections that the Supreme Court has held or otherwise indicated apply of their own force to unincorporated territories are those embodied in the First Amendment Free Speech Clause, the Fourth Amendment, the Due Process Clause, and the Equal Protection Clause. *See Harris*, 446 U.S. at 653 (listing cases); *Torres*, 442 U.S. at 469-70 (same). The only constitutionally protected individual rights that the Supreme Court has found inapplicable to unincorporated territories are the rights to trial by jury and to a grand jury indictment. *See Dorr*, 195 U.S. at 149 (no right to trial by jury in the Philippines); *Balzac*, 258 U.S. at 311 (no right to trial by jury in Puerto Rico).

The Fourteenth Amendment guarantee of citizenship to those born "in the United States" is precisely the type of "fundamental" restriction on government conduct that would apply of its own force under the *Insular Cases*. First, the rule of citizenship by birth in the territory of the sovereign predated not only its codification in our Constitution, but the

birth of this nation itself. *See Wong Kim Ark*, 169 U.S. at 658. Thus, the right to citizenship by birth in the territory, even before it was "expressed in so many words in the Constitution," *Dorr*, 195 U.S. at 147, was a right respected at common law in this country, in England, and indeed through much of Europe. *See Wong Kim Ark*, 169 U.S. at 666 ("the rule in Europe generally . . . [was that] 'mere birth within the realm gives the rights of a native-born citizen.' ").

It is difficult to conceive of a right more fundamental, or more jealously guarded, than the right of citizenship by birth affirmed in the Citizenship Clause. Fourteenth Amendment citizenship cannot be revoked for any reason without the consent of the citizen. *See Afroyim*, 387 U.S. at 267-68 ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. . . . Our holding does no more than [recognize each citizen's] constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.").

In contrast to the absolute nature of Fourteenth Amendment citizenship, other constitutional rights, such as those protected by the First Amendment, may be abridged if the government can demonstrate their restriction is necessary to further a compelling state interest. *See, e.g., Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992). Because First Amendment rights are among those fundamental limitations on government that apply of their own force, *see Torres*, 442 U.S. at 469, certainly the more absolute right of citizenship by birth must also apply of its own force.

Furthermore, our right to citizenship by birth outweighs even our right to life. For example, even when Congress could impose capital punishment for wartime desertion, it could not revoke United States citizenship as punishment for that same crime. *See Trop v. Dulles*, 356 U.S. 86, 99-102 (1958) (death

penalty is still widely accepted punishment, but expatriation "is a form of punishment more primitive than torture").

Thus, the majority opinion's application of the doctrine of territorial incorporation to the present case, without also considering whether citizenship is a fundamental right, incorrectly applies the law of the *Insular Cases* on which the majority opinion so heavily relies. And, the majority opinion's application of the doctrine of territorial incorporation abrogates Plaintiffs' fundamental right to United States citizenship by virtue of their birth in a territory of the United States—the Philippines.

CONCLUSION

A review of relevant authorities ineluctably leads me to conclude that the District Court erred in dismissing Plaintiffs' complaints for failure to state a claim, and that the majority opinion erroneously affirms that dismissal. Persons born in the Philippines during the territorial period indisputably were born within the dominion of the United States, and therefore were born "in the United States" within the meaning of the Citizenship Clause. Moreover, neither congressional power to control naturalization and regulate territories, nor the now disfavored doctrine of territorial incorporation, authorizes this Court to deny to these Plaintiffs what the people of this country sought to ensure under the Fourteenth Amendment—the inviolability of the fundamental right to citizenship by birth.

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
300 North Los Angeles Street
Los Angeles, CA 90012

File No. A37 546 018
Date: April 18, 1991

Merlita Pascua SUMMERFIELD
17338 Villa Park Street
La Puente, CA 91744

(PLEASE BRING YOUR VALID PASSPORT OR BIRTH CERTIFICATE)

As you know, following a hearing in your case you were found deportable and the hearing officer has entered an order of deportation. A review of your file indicates there is no administrative relief which may be extended to you, and it is now incumbent upon this Service to enforce your departure from the United States.

Arrangements have been made for your departure to _____ Philippines (country) on June 7, 1991 (date) from Los Angeles, California (port of departure) on the VIA COMMERCIAL AIRLINE (name of vessel, airline, or other transportation)

You should report to a United States Immigration Officer at Room B-18 (No.) 300 N. Los Angeles Street, Los Angeles, CA 90012 (address) at 10:00 AM June 7, 1991 (hour and date) completely ready for deportation. At the time of your departure from Los Angeles (place of surrender) you will be limited to 44 pounds of baggage.

Should you have personal effects in excess of this amount, you must immediately contact

Officer Mallory
at
213-894-6456
(phone no. and ext.)

or call in person at the address noted above, and appropriate disposition of your excess baggage will be discussed with you.

Very truly yours,
Sgd. District Director

Form 1-166
(Rev. 4-1-69)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A37 546 018

In the Matter of Ms. Merlita Pascua SUMMERFIELD Respondent.
c/o U.S. Immigration & Naturalization Service
Los Angeles, California
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of the Philippines and a citizen of the Philippines;
3. You entered the United States at Anchorage, Alaska on or about May 26, 1982;
(date)

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART THEREOF)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART THEREOF)

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at
A PLACE AND DATE TO BE SET
on _____ at _____ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof

Dated: August 28, 1987

(Signed)

(signature and title of issuing officer)

ASSISTANT DISTRICT DIRECTOR, DETENTION & DEPORTATION

LOS ANGELES, CALIFORNIA

(City and State)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, of from the date of the final order of the court, if judicial review is had, you shall be:

Detained in the custody of this Service.
Released under bond in the amount of $_____
Released on recognizance. [xxxx]

You may request the Immigration Judge to redetermine this decision.
[ ] I do [xx] do not request a redetermination by an Immigration Judge of the custody decision.

Sgd. Merlita P. Summerfield 8/28/87

(signature of respondent) (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

Declined 8/28/87

(signature of respondent) (date)

CERTIFICATE OF SERVICE

Served by me at Los Angeles, CA on August 28, 1987 at 1: 32 P. m.

(Signed)
(signature and title of employee or officer)

Elly Velez Pamatong, Esquire
5579 Mission Street
San Francisco, CA 94112

May 23, 1991

SUMMERFIELD
A37 546 018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very truly yours,

SGD. David L. Milhollan
Chairman

Enclosure

Panel Members:
James P. Morris
Fred W. Vacca
John M. Bryant

A37 546 018 - Los Angeles Date: May 23, 1991

In re: MERLITA PASCUA SUMMERFIELD

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Elly Velez Pamatong, Esquire
5579 Mission Street
San Francisco, CA 94112

ON BEHALF OF SERVICE: Moira Goodwin
General Attorney

CHARGE:

Order: Sec. 241 (a) (1), I & N Act [8 U.S.C. 1251 (a) (1)] - Excludable at entry under section 212 (a) (14), I&N Act [8 U.S.C. 1182 (a) (14)] - No valid labor certification

Sec. 241 (a) (1), I&N Act [8 U.S.C. 1251 (a) (1)] - Excludable at entry under section 212 (a) (20), I&N Act [8 U.S.C. 1182 (a) (20)] - No valid immigrant visa

Lodged: Sec. 241 (a) (1), I&N Act [8 U.S.C. 1251 (a) (1)] - Excludable at entry under section 212 (a) (19), I&N Act [8 U.S.C. 1182 (a) (19)] - Procured Visa by fraud or willful misrepresentation of a material fact

APPLICATION: Motion to reconsider

ORDER:

PER CURIAM. In a decision dated November 23, 1990, the Board upheld the immigration judge's finding of deportability, denial of suspension of deportation pursuant to section 244 (a) of the Act, 8 U.S.C. 1254 (a), and denial of a waiver pursuant to section 212 (k) of the Act, 8 U.S.C. 1182 (k). The respondent has made a motion to reconsider. The motion will be denied.

A motion to reconsider is used to allege errors in appraising the facts and the law and must be supported by such precedent decisions as are pertinent. See 8 C.F.R. 103.5. In this case, the respondent's motion to reconsider is simply a new presentation of the facts and information previously submitted.

She has presented no evidence of a change in the law which would warrant a motion to reconsider. Furthermore, as noted in our decision on November 23, 1990, the respondent remains statutorily ineligible for relief from deportation under any of the provisions for which she applied.

She has never presented any evidence of extreme hardship, a prerequisite for suspension of deportation; she is statutorily ineligible for section 212 (k) relief because she was never legally entitled to an immigrant visa; and she is statutorily ineligible for voluntary departure pursuant to section 101 (f) (6) of the Act, 8 U.S.C. 1101 (f) (6), on the basis of her own false testimony. Accordingly, the motion to reconsider will be denied.

Sgd. James P. Morris
FOR THE BOARD

File: A37 546 018 - Los Angles Date: Nov. 23, 1990

In re: MERLITA PASCUA SUMMERFIELD

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elly Velez Pamatong, Esquire
333 Gellert Blvd., Ste. 231
Daly City, CA 94015

ON BEHALF OF SERVICE: Moira Goodwin
General Attorney

CHARGE:

Order: Sec. 212 (a) (14), I&N Act [8 U.S.C. 1182 (a) (14) - No valid work authorization

Sec. 212 (a) (19), I&N Act [8 U.S.C. 1182 (a) (19)] - Procured immigrant visa by fraud or willful misrepresentation of a material fact

Sec. 212 (a) (20), I&N Act [8 U.S.C. 1182 (a) (20)] - No valid immigrant visa

APPLICATION: 212 (k) waiver; suspension of deportation; voluntary departure

The respondent's appeal from the June 29, 1989, decision of the immigration judge ordering her deported, denying her applications for relief under sections 212 (k) and 244 (a) of the Immigration and Nationality Act, 8 U.S.C. 1182 (k) and 1254 (a), and denying her request for voluntary departure pursuant to section 244 (e) of the Act, 8 U.S.C. 1254 (e), will be dismissed.

The respondent is a native and citizen of the Philippines who entered the United States as a lawful permanent resident on May 26, 1982 at Anchorage, Alaska, with her United States citizen husband. Their marriage was subsequently found to be invalid based on the respondent's failure to terminate a prior marriage.

The respondent was issued an Order to Show Cause on August 28, 1987, charging her with deportability under sections 241 (a) (1) of the Act, 8 U.S.C. 1251 (a) (1) and 212 (a) (20) and (14) of the Act as an alien who had entered the United States as an intended immigrant with no valid immigration documents, and as an alien who entered the United States with the intent and purpose of performing labor without authorization or labor certification.

She was also charged under section 212 (a) (19) of the Act, 8 U.S.C. 1182 (a) (19), as an alien who entered the United States and obtained documents by fraud and willful misrepresentation of material facts.

The record reflects that the respondent was first married in 1954 at the age of 16 to Juan Turda, Jr. Two children were born of that marriage. According to evidence in the file, the respondent fled to her mother's home after she was abused by her husband, taking her children with her. The next day she went to a magistrate to attempt to have the marriage annulled and was advised to give the marriage another chance. Custody of her daughter was then given to her husband. The respondent did not return to her husband and apparently had no further contact with him. The respondent testified that, shortly thereafter, her mother advised her that she had obtained an annulment on the respondent's behalf. The respondent met her second husband in 1971. She lived with him for approximately 9 years, and in 1980 was married to him in the Philippines in both a civil and religious ceremony. On the basis of this marriage she received an immigrant visa and entered the United States as a lawful permanent resident.

At her deportation hearing the respondent denied deportability, contending that she was unaware that her second marriage was invalid and that she had applied for the immigrant visa in good faith.

Although the respondent attempted to establish that she did not believe herself to be married to Juan Turda, Jr. at the time of her second wedding, the immigration judge found her testimony to be incredible and found her deportable as charged. The respondent sought relief from deportation by applying for a 212 (k) waiver, suspension of deportation, and voluntary departure, and by making a claim to United States citizenship.

The applications were denied and the respondent has appealed, asserting that the immigration judge abused his discretion in finding the respondent incredible and ineligible for any form of relief.

The respondent's first contention on appeal, that she is a United States citizen by virtue of her birth in the Philippines while it was a Commonwealth of the United States, is completely without merit. The respondent was the subject of a lawsuit on the merits of this claim in the Northern District of California, a copy of which accompanies her brief dated June 12, 1990. The United States District Court for the Northern District of California dismissed that lawsuit on March 23, 1990, finding that it was without jurisdiction to consider it. The respondent's decision to include it in her support of her brief on appeal, when it has already been dismissed, does little to advance her claim.

We also reject the respondent's contention that she did not know that she did not have the legal capacity to marry and thus did not have a fraudulent intent when she applied for her immigrant visa. The respondent has not satisfactorily explained why, if she believed her prior marriage to have been annulled, she did not obtain a copy of the certificate of annulment.

Furthermore, the respondent has not satisfactorily explained why, if she believed her prior marriage was annulled, she bothered to obtain assurances from her future son-in-law, a judge, that she had the legal capacity to marry even if she did not have a valid annulment.

The respondent either believed the marriage to be annulled or did not believe the marriage to be annulled. If she truly believed the marriage to be annulled, she would have obtained and presented a certificate of annulment. The fact that she could not or did not attempt to obtain one at the time of her second marriage indicates either that she knew her marriage was not annulled or that there was some question whether or not her marriage was annulled. In any case, her statement that she believed her marriage to be annulled at the time of her second marriage is not borne out by her testimony. The fact that she was unable to produce a certificate of annulment at the time of her second marriage would have put her on notice that the marriage was most likely not annulled.

We also do not find credible the respondent's assertions that her husband completed her immigrant visa application and that she was too dominated by him to object. It is clear that the respondent was aware that her natural children were not mentioned on the immigrant visa application despite the fact that the application specifically requested the names of "all" children. Although she stated at her hearing that she objected to the fact that they were not included, it is clear that she did not object to the interviewing officer, for he noted on her application during her interview that the beneficiary "has no kids.

We find that the record adequately supports the immigration judge's finding of incredibility and further, that the record supports the immigration judge's finding that the respondent is deportable under section 212 (a) (19) of the Act as an individual who procured a visa by fraud or willful misrepresentation of a material fact.

We turn now to the respondent's contention that she is not deportable under sections 212 (a) (20) and 212 (a) (14) of the Act because her second marriage is valid until declared void by a Philippine court.

The respondent contends that Article 83 of the Civil Code of the Philippines, which was in effect at the time of her marriage, determines whether a marriage is void or voidable. It provides:

"Any marriage subsequently contracted by any person during the lifetime of the first spouse of such person with any person other than such first spouse shall be illegal and void from its performance, unless: (1) the first marriage was annulled or dissolved; or (2) the first spouse had been absent for seven consecutive years at the time of the second marriage without the spouse present having news of the absentee being alive, or, that the absentee, though he has been absent for less than seven years, is generally considered as dead and believed to be so by the spouse present at the time of contracting such subsequent marriage, or if the absentee is presumed dead according to Article 390 and 391. A marriage so contracted shall be valid in any of the three cases until declared null and void by a competent court."

Under Philippine law, the second marriage remains legal if entered into in good faith. Good faith means the absence of fraudulent intent, and requires more than mere belief or suspicion. It requires a show of diligent inquiry and investigation and some fact of facts on which one could, in good faith, base a belief in the death of a spouse. See Letter from Carleton W. Kenyon, Law Librarian, The Library of Congress, dated March 14, 1989 (Exhibit G).

In this case, it is clear that the respondent did not believe her first husband to be dead. Indeed, although she may not have directly heard from her husband in the 22 years prior to her second marriage, it is clear that she had some news of him, for she contacted his sister in 1964 when she regained custody of her daughter.

Furthermore, she acknowledged in her testimony that she lived with her second husband in the same town as her first husband for a 3-year period between 1977 and 1980, but that she did not contact her first husband because, "I was afraid. I was in constant fear. Of course, I would not go back to him because I was so much afraid of him. I don't want to be bothered again." (Tr. at 134, 165 (June 29, 1989)]. Absent a showing that the respondent believed her husband to be dead, and absent a showing that she made diligent inquiry into his whereabouts before proceeding with her second marriage, we reject her attempt to claim that her marriage is merely voidable until declared void by a competent Philippine court. The respondent's marriage was not annulled her husband was not dead, and she has not established that he had disappeared or could not be located despite diligent inquiry. The respondent has not established that she was legally married to Orville Summerfield. Accordingly, we find her deportable under sections 212 (a) (14), (19), and (20) of the Act.

Finally, we turn to a consideration of the respondent's applications for relief under section 212 (k), 244 (a) and (e). The respondent is clearly not eligible for relief under section 212 (k) of the Act, which will grant a waiver to one who is excludable from the United States under paragraph (14), (20), or (21) of subsection (a) [of section 212], who is in possession of an immigrant visa, and who establishes to the satisfaction of the Attorney General that the exclusion was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States.

First, the respondent would not be assisted by a granting of a waiver under section 212 (k) because it only waives deportability for those found excludable under paragraphs (14), (20), or (21) of subsection (a) of section 212.

As the respondent has also been found deportable under section 212 (a) (19) of the Act, the granting of a 212 (k) waiver would be inconsequential. Second, even if she had not been found deportable under section 212 (a) (19) of the Act she still would not be statutorily eligible for relief under section 212 (k) of the Act. The purpose of the 212 (k) waiver is to correct certain technical defects in immigrant visas which are not the fault of the alien involved. See Legislative History of Section 18 (e) of the Act of Dec. 29, 1981, P.L. 97-116, 95 Stat. 1161, reprinted in 1981 U.S. Code Cong. & Ad. News 2603. It could be granted, for example, in the case of a person who is in possession of a valid immigrant visa but who is excludable at the time of entry because his or her passport has expired while he or she was enroute to the United States.

It could be granted in the case of the spouse or child of a special immigrant who, instead of "accompanying or following to join" him as required by the Act, accidentally arrives in the United States before the special immigrant. It was not meant to correct situations such as this one in which the individual was never legally entitled to the immigrant visa. Accordingly, we find that the respondent is statutorily ineligible for relief from deportation under section 212 (k) of the Act.

Turning to the respondent's application for suspension of deportation under section 244 (a) of the Act, the statute requires the respondent to present evidence that she is a person of good moral character and that she will suffer extreme hardship if deported to the Philippines. Although the record indicates that the respondent sold certain assets in order to follow her husband to the United States and that she has lived here for over 8 years, this alone does not establish extreme hardship. Her natural children are grown and do not reside with her. One lives in Saudi Arabia and one lives in the Philippines. Her adopted daughter lives in the Philippines.

Moreover, her brother and 5 sisters still reside in the Philippines and she still maintains close ties to the Philippines. As the respondent has offered no evidence of extreme hardship we also will dismiss this portion of the appeal.

Finally, we turn to the respondent's request for voluntary departure pursuant to section 244 (e) of the Act. Section 244 (e) of the Act, provides that the Attorney General, in his discretion, may grant voluntary departure to a deportable alien if such alien can establish to the satisfaction of the Attorney General that he or she has been a person of good moral character for at least 5 years immediately preceding his or her application for voluntary departure. An alien must establish not only that he is statutorily eligible for voluntary departure, but also that he is worthy of discretionary relief. See 8 C.F.R. 242.17 (e); Matter of Seda, 17 I&N Dec. 550 (BIA 1980); Matter of Turcotte, 12 I&N Dec. 206 (BIA 1967); Matter of Mariani, 11 I&N Dec. 210 (BIA 1965). In determining whether an alien is worthy of discretionary relief, the Board considers many factors, including the alien's prior immigration history, the nature of his entry, and his violations of immigration and other laws, as well as his length of residence in the United States, close family ties, and humanitarian needs. See Matter of Seda, supra; Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972).

In this case, we find that the respondent is statutorily precluded from establishing good moral character based on section 101 (f) (6) of the Act, 8 U.S.C. 1101 (f) (6) which provides that a person may not be considered to be of good moral character for the purposes of the Act if that person has given false testimony for the purpose of gaining benefits under the Act.

As the respondent has given false testimony for the purposes of acquiring an immigrant visa, and as she has been found deportable under section 212 (a) (19) as a person who has procured a visa by fraud or willful misrepresentation of a material fact, we find that she has not established good moral character as required by section 244 (e) of the Act. Her request for voluntary departure will therefore be denied.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Sgd. James P. Morris
FOR THE BOARD